

FILED

OCT 12 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
B.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 28798-0-III

STATE OF WASHINGTON, Respondent,

v.

JASON BLAIR LATIMER, Appellant.

APPELLANT'S BRIEF

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TABLE OF CONTENTS

Authorities Cited.....ii

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....2

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR2

IV. STATEMENT OF THE CASE.....2

V. ARGUMENT.....6

VI. CONCLUSION.....14

CERTIFICATE OF SERVICE15

AUTHORITIES CITED

Federal Cases

Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).....8, 9
U.S. v. Abel, 469 U.S. 45, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984).....9

State Cases

State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009).....7
State v. Fondren, 41 Wn. App. 17, 701 P.2d 810 (1985).....10
State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983).....8
State v. Jones, 25 Wn. App. 746, 610 P.2d 934 (1980).....9
State v. McDaniel, 83 Wn. App. 179, 920 P.2d 1218 (1996).....11, 12, 13
State v. Teal, 117 Wn. App. 831, 73 P.3d 402 (2003).....7
State v. Wilder, 4 Wn. App. 850, 486 P.2d 319 (1971).....9
State v. Young, 48 Wn. App. 406, 739 P.2d 1170 (1987).....14

Rules of Court

ER 4048
ER 6098

Other Authorities

5A Karl B. Teglund, *Washington Practice: Evidence Law and Practice* § 607.10
(4th Ed. 1999).....9-10

I. INTRODUCTION

Jason Latimer was charged with first degree and second degree assault arising out of a shooting incident. No casings were found, the bullet was never removed from the victim's abdomen, and the only weapon recovered was a revolver pistol found inside the car that the victim drove to the hospital.

At trial, Latimer sought to present a self-defense theory, arguing that the victim, Arturo Mendoza, had the gun and was shot when Latimer struggled with him to take the gun away. In support of his theory, he proffered Mendoza's prior conviction for unlawful possession of a firearm in the second degree. The trial court suppressed the prior conviction under ER 404 and 609, and Latimer was convicted by the jury.

By suppressing evidence of Mendoza's prior conviction, the trial court took a critical fact from the jury that likely affected the jury's evaluation of the evidence and Latimer's version of events. In so doing, the trial court improperly restricted Latimer's Sixth Amendment rights to confront his accuser and present his defense. Without evidence of the conviction, Latimer could not demonstrate to the jury why he feared Mendoza as a dangerous felon, and why Mendoza had a powerful motive to lie about possessing the gun involved in the shooting. Because these

errors cannot reasonably be said to be harmless, the judgment and sentence should be vacated, the conviction reversed, and the case remanded for a new trial.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in suppressing evidence of Mendoza's prior conviction for unlawfully possessing a firearm under ER 404 and 609.

ASSIGNMENT OF ERROR 2: The trial court deprived Latimer of his Sixth Amendment rights when it restricted Latimer from confronting his accuser and presenting the facts supporting his claim of self-defense.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Should the trial court have admitted Mendoza's prior conviction under ER 404 or 609?

ISSUE 2: Did the exclusion of Mendoza's prior conviction deprive Latimer of the opportunity to confront his accuser and present a defense?

ISSUE 3: Was the trial court's error in excluding Mendoza's prior conviction harmless?

IV. STATEMENT OF THE CASE

The State charged Jason Latimer with assaulting Arturo Mendoza in the first or second degree alternatively, and Adel Cariveau in the second degree. Clerk's Papers ("CP") 15-17. All counts carried firearm enhancements, and the charge against Adel Cariveau also carried a domestic violence enhancement. CP 15-17.

At the time of his arrest, Latimer gave a recorded statement to the arresting officers. 3/27/2008 Report of Proceedings (“RP”) 1-45.¹ He told the officers that Cariveau was his girlfriend, and Mendoza was her ex-boyfriend. 3/27/2008 RP 4. On the date of the incident, Cariveau had been gone for four days. 3/27/2008 RP 6. He thought she was at the coast. 3/27/2008 RP 9. When she called him, they argued on the phone. *Id.* As he was driving down the street, he saw her car. 3/27/2008 RP 12. Latimer believed that if she was in Moses Lake, she was with Mendoza. *Id.*

Latimer tried to avoid being seen by Cariveau, but she ended up driving directly at him and he saw another head in the car. 3/27/2008 RP 13. He saw that Mendoza was with her. *Id.* Latimer was angry, and he pulled in front of them, got out of the car, and began yelling at Mendoza. *Id.* When he got up to the car, he saw that Mendoza had a revolver. 3/27/2008 RP 14.

Cariveau drove away and Latimer followed them. 3/27/2008 RP 15. When they stopped again, Latimer got out and went straight for

¹ Because the Verbatim Report of Proceedings consists of multiple volumes that are not serialized, references thereto shall refer to the date of the proceeding for identification. For purposes of identifying the March 27, 2008 Grant County Sheriff’s recorded interview of Jason Latimer, which recording was played during the trial, the “date of the proceeding” is the date the interview was originally conducted.

Mendoza's window. 3/27/2008 RP 16. When he first approached, the cylinder was removed from the gun, but Mendoza was trying to put it together. 3/27/2008 RP 16, 17. Latimer tried to hit and kick the window until he finally broke it. 3/27/2008 RP 17, 18. He struggled with Mendoza to take the gun away. 3/27/2008 RP 19. Mendoza kicked and the gun fired and struck him. *Id.*

Latimer asserted that he acted in self-defense. 10/21/09 RP 50. At trial, Latimer sought to introduce evidence that Mendoza had previously been convicted for unlawfully possessing a firearm. 10/21/09 RP 9. The evidence was offered under both ER 404 and ER 609. 10/21/09 RP 12. Latimer argued that the evidence was relevant to show that Mendoza had a motive to fabricate his testimony to assert that Latimer brought a gun to the car to shoot him. 10/21/09 RP 12. The trial court also considered the conviction's admissibility to show bias under ER 609, as well as establishing the victim's quarrelsome or violent character under ER 404. 10/21/09 RP 16, 22. The court decided that because the prior conviction was similar to the present case, its admission would be unduly prejudicial and refused to admit it. 10/21/09 RP 34.

After opening argument, Latimer renewed his request to admit the evidence, this time arguing that under the Sixth Amendment to the U.S.

Constitution, his right to meaningfully and effectively cross-examine Mendoza required the conviction to be admitted unless the State established a compelling state interest justifying its exclusion. 10/22/06 RP 9-11. He argued that the nature of the altercation went directly to his ability to argue self-defense and that without introducing the prior conviction he could not demonstrate to the jury that Mendoza had a motive to lie about possessing the gun that was used in the incident. 10/22/06 RP 19-22. The court deferred any further ruling. 10/22/06 RP 23.

At trial, the State elicited evidence that while no gun was found in Latimer's vehicle, a gun was found in the car belonging to Cariveau in which the shooting occurred. 10/22/09 RP 42-43. The bullet was not removed from Mendoza's abdomen. 10/26/09 RP 30. Consequently, no evidence was presented that would establish whether the bullet was fired from the gun found in Cariveau's car or from some other gun.

Cariveau testified that she had known Latimer to possess handguns in the past and claimed that the handgun found in her car belonged to Latimer. 10/22/09 RP 85-88. However, she also described the gun involved in the shooting as a small revolver. 10/22/09 RP 133-34. Cariveau admitted that Mendoza had physically abused her during their

relationship and that she had told Latimer about that history. 10/22/09 RP 150-51. However, the trial court prevented Latimer from inquiring into any specific instances of abuse. 10/22/09 RP 151.

Before Mendoza testified, the trial court revisited the admissibility of Mendoza's prior conviction for unlawful possession of a firearm. The trial court ultimately ruled that the parties could inquire whether Mendoza had been convicted of a crime that prohibited him from owning a firearm, but could not inquire more specifically. 10/23/09 RP 16. The State subsequently elicited from Mendoza that he had been convicted of a crime that prohibited him from owning or possessing a gun. 10/26/09 RP 11, 12-13. He denied having a gun in his possession on the date of the incident. 10/26/09 RP 19.

The jury convicted Latimer of first degree assault on Mendoza and second degree assault on Cariveau. CP 188, 190. It also found that the sentencing enhancements were true. CP 191, 193-94. The trial court sentenced Latimer to serve 140 months with an additional 5 years imposed for the firearm enhancement, and Latimer timely appeals. CP 229, 253.

V. ARGUMENT

Latimer's theory of defense rested on his statement to the police that Mendoza possessed a gun and was shot accidentally when Latimer

attempted to wrest the gun away from him. Thus, Mendoza's credibility and his motive to testify untruthfully were critical issues in the case. By refusing to permit the introduction of Mendoza's prior conviction for unlawful possession of a firearm, the trial court deprived the jury of the opportunity to hear all of the facts necessary to evaluate why Latimer approached Cariveau's vehicle and whether Mendoza was telling the truth about Latimer having a gun before he came to the car. And in so doing, the trial court improperly restricted Latimer's Sixth Amendment rights to confront and cross-examine his accuser and to argue that he acted in self-defense when he approached the car and forcibly took the gun from Mendoza. Because a reasonable jury hearing the full story could have easily reached a different result, the judgment should be reversed.

Ordinarily, the Court of Appeals reviews a trial court's decision to admit or exclude evidence of prior misconduct for abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). The trial court's interpretation of the evidentiary rules, however, is reviewed *de novo*. *Id.* Likewise, a ruling admitting or excluding evidence of a prior conviction for purposes of impeaching the witness's credibility is reviewed for abuse of discretion. *State v. Teal*, 117 Wn. App. 831, 844, 73 P.3d 402 (2003).

Latimer proffered Mendoza's prior conviction under both ER 404 and ER 609. ER 609(a) permits the introduction of felony convictions that are less than ten years old to impeach the credibility of a witness if the probative value outweighs the potential for prejudice. In addition, under ER 404(a)(2), the trial court may admit

Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

Lastly, ER 404(b) allows specific prior acts to be admitted for purposes other than to show action in conformance therewith, including motive or bias.

Both the Washington and the U.S. Constitutions guarantee criminal defendants the right to confront and cross-examine adverse witnesses. *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). In particular, the Confrontation Clause guarantees the right to explore a witness's bias or ulterior motives. *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). Defense counsel must be "permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Id.* at 318.

“Bias” is a general term incorporating various factors that can cause a witness to fabricate or slant her testimony, such as prejudice, self-interest, or ulterior motives. *See Davis*, 415 U.S. at 316. “Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness’s testimony.” *U.S. v. Abel*, 469 U.S. 45, 52, 83 L. Ed. 2d 450, 105 S. Ct. 465 (1984). Indeed, proof of a witness’s bias is so critical to the truth-seeking function of the jury that a defendant always has a right to prove bias by extrinsic evidence. *Id.*; *State v. Jones*, 25 Wn. App. 746, 750-51, 610 P.2d 934 (1980).

Because the right of cross-examination is constitutionally guaranteed, defendants enjoy wide latitude to cross-examine state witnesses as to their biases. *State v. Wilder*, 4 Wn. App. 850, 854, 486 P.2d 319 (1971) (“It is fundamental that a defendant charged with the commission of a crime should be given great latitude in the cross-examination of prosecuting witnesses to show motive or credibility.”). Evidence which might ordinarily be inadmissible on other grounds may still be admissible to show bias. *Abel*, 469 U.S. at 55 (specific instances of misconduct, although admissible under ER 608(b) to show “character for untruthfulness,” were admissible to show bias); 5A Karl B. Tegland,

Washington Practice: Evidence Law and Practice § 607.10 at 331 (4th Ed. 1999) (“When acts of misconduct or criminal convictions are offered to show bias [as opposed to a general tendency towards untruthfulness], the restrictions in Rules 608 and 609 are inapplicable.”).

Here, Latimer proffered Mendoza’s prior conviction for unlawful possession of a firearm to show that Mendoza had a motive to testify untruthfully about the events leading up to the shooting because he knew that he could be charged with a crime if he admitted being in possession of a gun. And the question of who brought the gun to the dispute was central to the claim of self-defense. Specific acts of misconduct are admissible to show whether the defendant had a reasonable apprehension of danger. *State v. Fondren*, 41 Wn. App. 17, 25, 701 P.2d 810 (1985). As such, Mendoza’s prior conviction was highly relevant to explain why Latimer acted the way he did when he saw Mendoza in the car and realized Mendoza had a weapon.

Although the trial court allowed “sanitized” evidence of Mendoza’s conviction to be presented to the jury – evidence that Mendoza had been convicted of a felony that prohibited him from owning or possessing a firearm on the date of the shooting – the sanitized evidence actually had the *opposite* effect on Latimer’s defense. It suggested that

Mendoza was not the one with the gun because it would have been illegal for him to have a gun. But had the jury known that Mendoza *did not respect the law's prohibitions on gun ownership*, the effect of the evidence would have been entirely different. Instead of suggesting that Mendoza probably didn't have the gun, it would have pointed to Mendoza's dangerous character as an explanation for Latimer's actions *as well as* why Mendoza had a motive to lie about what happened.

In *State v. McDaniel*, the Court of Appeals considered whether the constitutional right of confrontation and cross-examination required the admission of evidence that a witness was on probation and had a motive to lie to avoid the consequences of a probation violation. 83 Wn. App. 179, 920 P.2d 1218 (1996). The *McDaniel* court acknowledged that in evaluating the defendant's confrontation rights, the trial court must determine whether the evidence sought to be introduced is relevant and, if so, whether the state can show a compelling state interest in excluding evidence that would be so prejudicial as to disrupt the fairness of the fact-finding process. *Id.* at 185.

In analyzing the facts of that case, the *McDaniel* court determined that the fact that the witness was on probation with conditions to avoid drug use was relevant because established a motive to lie about the

recency of drug use. 83 Wn. App. at 186-87. Furthermore, although the State had a compelling interest in avoiding an acquittal based on prejudice against the victim's unsavory history, the prejudice to the State was minimal because the trial court had already allowed evidence of the victim's drug use. *Id.* at 187. Accordingly, the *McDaniel* court reversed the conviction and remanded for a new trial. *Id.* at 188.

The facts of the present case are analogous to the facts presented in *McDaniel*. The evidence of Mendoza's prior conviction was relevant to establish his motive to lie about how the shooting incident occurred. It was also relevant to show that Latimer acted as he did because he feared Mendoza as a dangerous individual who illegally carried firearms. The prejudice to the State of introducing the conviction was minimal because the trial court allowed evidence that Mendoza had been convicted of a crime that prohibited him from owning or possessing a gun. Thus, the jury already had a reason to view Mendoza as a bad character. Identifying the specific conviction would not have increased the potential for prejudice, but it would have given the jury a fuller picture of the relationship between the parties involved and a more specific reason to question Mendoza's credibility.

Because a violation of a defendant's confrontation rights is an error of constitutional magnitude, it is presumed to be prejudicial and the burden is on the State to show that the error was harmless. *McDaniel*, 83 Wn. App. at 187. The reviewing court looks to the untainted evidence to determine whether it is so overwhelming that it necessarily leads to a finding of guilt. *Id.* at 187-88.

Here, the only witnesses to the actual shooting were Latimer, Mendoza, and Cariveau. Therefore, Mendoza's credibility was critical in the jury's determination of what actually happened. And although Cariveau's testimony generally corroborated Mendoza's version of events, Cariveau herself had a history of lying about her relationship with Mendoza as well as a motive to lie in order to protect him. Under these circumstances, the jury should have been given every relevant fact to evaluate the testimony of everybody involved. If the jury did not believe Mendoza, it likely would have put more weight on the fact that the only gun recovered was in the car with Mendoza. And if Mendoza was the one with the gun, Latimer's theory of self-defense becomes considerably more persuasive.

VI. CONCLUSION

When evidence is central to establishing a valid defense, the balance should be struck in favor of admitting the evidence. *State v. Young*, 48 Wn. App. 406, 413, 739 P.2d 1170 (1987). Here, the trial court's exclusion of Mendoza's prior conviction effectively hamstrung Latimer's claim of self-defense and restricted his ability to effectively cross-examine Mendoza on his motive to lie. Because Mendoza's credibility was a central issue, it cannot be said that Latimer's inability to present all of the facts relevant to determining what happened on the day Mendoza was shot was harmless beyond a reasonable doubt. Accordingly, the judgment should be vacated and the conviction reversed and remanded for a new trial.

RESPECTFULLY SUBMITTED this 9th day of October, 2010.



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DECLARATION OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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

Signed this 8th day of October, 2010 in Walla Walla, Washington.



Andrea Burkhart