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Court of Appeals
Division III
State of Washington

No. 29832-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Darrell Smith,

Appellant.

Grant County Superior Court Cause No. 10-1-00119-3

The Honorable Judge Evan Sperline

Appellant's Reply Brief

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ARGUMENT

I. MR. SMITH’S CONVICTIONS MUST BE REVERSED BECAUSE EXTRINSIC EVIDENCE TAINTED THE JURY’S VERDICT.

A. Respondent seeks to apply the wrong standard of review.

Ordinarily, a trial court’s decision denying a motion for a new trial is reviewed for an abuse of discretion.¹ *State v. Johnson*, 137 Wash.App. 862, 870-871, 155 P.3d 183 (2007).

However, where constitutional errors are involved, review is *de novo*. See, e.g., *State v. Iniguez*, 167 Wash.2d 273, 280-81, 217 P.3d 768 (2009) (reviewing *de novo* decisions granting a continuance and denying severance, in light of constitutional violations alleged). Respondent erroneously seeks to apply a pure abuse-of-discretion standard, failing to acknowledge the constitutional error raised by Mr. Smith. Brief of Respondent, pp. 21, 22. Because the error infringed Mr. Smith’s right to due process, review is *de novo*. *Iniguez*, at 280-281.

Furthermore, where jurors are exposed to extrinsic evidence during deliberations, the verdict can only be sustained if the prosecution can show beyond a reasonable doubt that the extrinsic evidence did not contribute to

¹ The amount of deference owed is greater where the trial court grants a motion for a new trial. *Johnson*, at 871

the verdict. *Johnson*, at 870-871. Any doubts must be resolved in favor of a new trial. *Id.*, at 869. This is consistent with the constitutional standard for harmless error. *See, e.g., State v. Jasper*, 174 Wash. 2d 96, 117, 271 P.3d 876 (2012).

B. Respondent concedes error, and cannot show it was harmless beyond a reasonable doubt.

The extrinsic evidence to which the jury was exposed included Mr. Smith's statement that he'd sat behind Chadwick (in the vehicle) and apologized to him. Ex. 93, 94. This statement was not duplicated elsewhere in the recording, and it contradicted Mr. Smith's theory (that his other recorded statements related only to the shoplifting incident from Wal-Mart). Furthermore, the trial judge refused to instruct jurors to disregard the extrinsic evidence. RP (1/26/11) 679, 690-691; CP 117-121; Ex. 93.

Instead of being merely "cumulative of the overwhelming evidence of guilt,"² the extrinsic evidence included Mr. Smith's own implied confession—the apology to Chadwick—that he'd committed crimes *against Chadwick* and not merely against Wal-Mart. Ex. 93, 94. This "confession" provided the jury with powerful evidence of Mr. Smith's

² Brief of Respondent p. 21.

guilt, and went directly to the central issues in the case. *Cf. State v. Briggs*, 55 Wash. App. 44, 57-58, 776 P.2d 1347 (1989) (extrinsic evidence relating to central issue in the case requires reversal, even if cumulative). Respondent does not even acknowledge this evidence, much less address its importance to the jury’s verdicts. *See* Brief of Respondent, pp. 24-25 (summarizing the “only two statements that could reasonably be viewed as incriminating...”)

Furthermore, contrary to Respondent’s assertion, the jury did not find the testimony of Chadwick and Donini sufficiently convincing, “vivid and detailed”³ though it might have been; nor were jurors persuaded to vote guilty by the physical evidence, most of which was entirely consistent with Mr. Smith’s admission that he’d stolen from Wal-Mart (with help from both Donini and Chadwick). *See* Brief of Respondent, p. 23.

Similarly, neither Officer Lloyd’s summary of Mr. Smith’s statements nor the jury’s collective memory of the recording resulted in unanimous guilty verdicts. Instead, the jury twice indicated that it was deadlocked. CP 79, 80. The stalemate was broken only after the court played the recording, including the portion that was not admitted into evidence. CP 79, 80; Ex. 93, 94; RP (711-713). This event—including

³ Brief of Respondent, p. 22.

exposure to extrinsic evidence—resolved whatever issues stood in the way of unanimous decisions, and the jury returned to declare its verdicts shortly thereafter.⁴ Accordingly, it cannot be said that the error was harmless beyond a reasonable doubt.

The state further asserts that the portion of the recording of which Appellant complains was not played for the jury during their deliberations. See Brief of Respondent, p. 17-18. But the record is clear that it was stopped during minute 51, which is after the statement was heard. RP 689-690.

The extrinsic evidence “could have affected the jury’s determinations.” *State v. Boling*, 131 Wash.App. 329, 333, 127 P.3d 740 (2006). Thus, Mr. Smith’s convictions violated his right to due process under the Fourteenth Amendment and Article I, Section 3. The convictions must be reversed and the case remanded for a new trial. *Id.*

⁴ Respondent speculates that the jury’s quick decision after viewing the video (including extrinsic evidence) can be explained by the fact that the first viewing occurred when they lacked the context to properly consider it. Brief of Respondent, p. 26. Such speculation cannot be considered persuasive, in light of Respondent’s burden to show harmlessness beyond a reasonable doubt. *Johnson*, at 870-871.

II. RESPONDENT’S CONCESSION REGARDING THE PRIVACY ACT VIOLATION REQUIRES REVERSAL.

A. Privacy Act violations may be raised for the first time on review.

Under the Privacy Act, illegal recordings “*shall be inadmissible in any civil or criminal case...*” RCW 9.73.050 (emphasis added). The Act “puts a high value on the privacy of communications,”⁵ and even requires exclusion of “conversations relating to unlawful matters if the recordings were obtained in violation of the statutory requirements.” *State v. Williams*, 94 Wash.2d 531, 548, 617 P.2d 1012 (1980).

Without citation to authority (other than RAP 2.5 itself), Respondent argues that Privacy Act claims may only be raised on appeal under RAP 2.5(a)(3). Brief of Respondent, p. 28. This is incorrect. The Act embodies the legislature’s strong desire to protect the privacy of Washington residents, including those engaged in criminal activity. *Williams*, at 548. The robust expression of this sentiment—which is consistent with the strong protections available under Wash. Const. Article I, Section 7—suggests the legislature intended to allow parties to raise Privacy Act violations on review, even absent objection in the trial court. *See* RCW 9.73.050.

⁵ *State v. Christensen*, 153 Wash.2d 186, 201, 102 P.3d 789 (2004).

The two cases cited by Respondent do not hold otherwise. *See* Brief of Respondent, p. 28 (citing *State v. Cunningham*, 93 Wash.2d 823, 613 P.2d 1139 (1980) and *State v. Courtney*, 137 Wash. App. 376, 383, 153 P.3d 238 (2007)). Instead, both cases hold that Privacy Act violations are subject to the standard for non-constitutional harmless error, since they are not of constitutional magnitude. *Cunningham*, at 831; *Courtney*, at 383-384 (citing *Cunningham*).⁶

Furthermore, even if the error is not preserved, the Court of Appeals has discretion to hear any issue raised for the first time on review. *See State v. Russell*, 171 Wash.2d 118, 122, 249 P.3d 604 (2011).

B. The Privacy Act violation was not harmless.

Respondent does not dispute Mr. Smith's Privacy Act claim on its merits.⁷ Brief of Respondent, pp. 27-28. Respondent's silence on this point may be treated as a concession. *See In re Pullman*, 167 Wash.2d 205, 212 n.4, 218 P.3d 913 (2009).

⁶ The *Cunningham* court also criticized the Court of Appeals for *sua sponte* addressing a Privacy Act issue that (1) had not been raised in the trial court, (2) had not been assigned error, (3) was not clearly disclosed in the appellants' issue statements, and (3) had not been argued in the appellants' briefs. *Cunningham*, at 836.

⁷ Instead, Respondent seeks to avoid the merits (by arguing the court should not review the issue), and (in the alternative) argues harmless error.

Reversal is required unless Respondent can show a reasonable probability that the error did not materially affect the outcome of trial. *State v. Porter*, 98 Wash.App. 631, 638, 990 P.2d 460 (1999). For the reasons outlined above, Respondent cannot make this showing. Accordingly, Mr. Smith's convictions must be reversed and the case remanded for a new trial. *Id.*

III. MR. SMITH WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Smith rests on the argument set forth in the Opening Brief.

IV. THE COURT'S NONSTANDARD "TO CONVICT" INSTRUCTIONS VIOLATED MR. SMITH'S RIGHT TO DUE PROCESS.⁸

Our criminal justice system rests on proper application of the burden of proof and the reasonable doubt standard. *See, e.g., Sullivan v. Louisiana*, 508 U.S. 275, 280-281, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Bennett*, 161 Wash.2d 303, 307-308, 165 P.3d 1241

⁸ Regarding the court's nonstandard introductory instructions, Mr. Smith rests on the argument set forth in the Opening Brief.

(2007). Alterations to the carefully drafted pattern instructions should not be made lightly.⁹ *See Bennett*, at 307-308, 317-318.

Here, the trial court failed to use the standard language explaining the jury's duty. CP 52-53, 60, 62, 64, 66, 71, 74. *Cf.*, *e.g.*, WPIC 35.19. The court's alteration—replacing the phrase “it will be your duty to return a verdict of not guilty” with the more permissive phrase “you should return a verdict of not guilty”—deviated from the language approved for use in every single pattern instruction addressing the elements of an offense. *Compare* CP 52-53, 60, 62, 64, 66, 71, 74 *with* WPIC 4.21 (“Elements of the Crime – Form.”)

Because the error is structural, Mr. Smith need not show practical and identifiable consequences to meet RAP 2.5's requirement of “manifest error.” *See, e.g., State v. Strode*, 167 Wash. 2d 222, 229, 217 P.3d 310 (2009) (The public trial right is “an issue of such constitutional magnitude that it may be raised for the first time on appeal,” even absent a clear showing of prejudice); *see also See United States v. Gonzalez-Lopez*, 548 U.S. 140, 149, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006) (describing

⁹ Indeed, the Supreme Court has exercised its supervisory authority to forbid trial courts from altering the pattern reasonable doubt instruction. *Bennett*, at 306, 318.

structural error). Respondent's argument regarding manifest error is thus not well taken. *See* Brief of Respondent, pp. 30-31.

Courts in other states are divided regarding use of the word "should" in this context. *See Massachusetts v. Caramanica*, 729 N.E.2d 656, 659 (2000) (reversing conviction); *Torrence v. Florida*, 574 So.2d 1188, 1189 (1991) (rejecting challenge to use of "should.") Washington courts have yet to resolve the issue.

Reversal is required even if the word "should" has "essentially the same meaning" as the language in the pattern instruction. *See* Brief of Respondent, p. 31. Instructions must make the relevant standard manifestly apparent to the average juror. *State v. Kylo*, 166 Wash.2d 856, 864, 215 P.3d 177 (2009). An instruction that merely conveys the gist of the jury's role is insufficient. *Id.*

The trial court deviated from the pattern instructions and undermined Mr. Smith's right to due process. Accordingly, the convictions must be reversed and the case remanded for a new trial.

Sullivan, supra.

V. MR. SMITH'S CONVICTION IN COUNT V VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF THE OFFENSE.

Mr. Smith rests on the argument set forth in the Opening Brief.

VI. RESPONDENT CONCEDES THAT THE RECORD DOES NOT SUPPORT IMPOSITION OF \$1,450 IN LEGAL FINANCIAL OBLIGATIONS.

In light of Respondent's concession, Mr. Smith rests on the argument set forth in the Opening Brief.

CONCLUSION

Mr. Smith's convictions must be reversed. Counts IV and V must be dismissed with prejudice, and the remaining counts must be remanded for a new trial.

Respectfully submitted on August 3, 2012,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 3, 2012.



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