

FILED  
MARCH 9, 2015  
Court of Appeals  
Division III  
State of Washington

No. 32318-8-III

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

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

WILLIAM P. MCBRIDE,  
Defendant/Appellant.

APPEAL FROM THE WHITMAN COUNTY SUPERIOR COURT  
Honorable David Frazier, Judge

---

APPELLANT'S REPLY BRIEF

---

Laura M. Chuang, WSBA No. 36707  
Of Counsel  
David N. Gasch, WSBA No. 18270  
Gasch Law Office  
P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149

**TABLE OF CONTENTS**

A. ARGUMENT IN REPLY TO STATE’S RESPONSE.....1

The trial court abused its discretion by allowing the prosecutor to elicit testimony from Ms. Baird regarding the details of her prior conviction for false statement. The line of questioning went beyond the fact of conviction, type of crime, and punishment imposed, which exceeded the permissible scope of ER 609(a).....1

B. CONCLUSION.....6

## TABLE OF AUTHORITIES

### Cases

|                                                                                                                                                                      |            |
|----------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------|
| <u>State v. Clark</u> , 143 Wn.2d 731, 24 P.3d 1006 (2001).....                                                                                                      | 1, 2       |
| <u>State v. Griswold</u> , 98 Wn. App. 817, 991 P.2d 657 (2000)<br>abrogated on other grounds <u>State v. DeVincentis</u> ,<br>150 Wn.2d 11, 74 P.3d 119 (2003)..... | 4, 5       |
| <u>State v. Wilson</u> , 60 Wn. App. 887, 808 P.2d 754 (1991).....                                                                                                   | 1, 3, 4, 5 |

### Rules

|                 |            |
|-----------------|------------|
| ER 403.....     | 3, 5       |
| ER 608.....     | 1, 2, 3, 5 |
| ER 608(b) ..... | 1, 2, 4    |
| ER 609.....     | 3, 5       |
| ER 609(a) ..... | 1          |

## A. ARGUMENT IN REPLY TO STATE'S RESPONSE

Mr. McBride relies primarily upon his Brief of Appellant to address all issues raised by the State. He also argues as follows in direct reply to the State's response.

The trial court abused its discretion by allowing the prosecutor to elicit testimony from Ms. Baird regarding the details of her prior conviction for false statement. The line of questioning went beyond the fact of conviction, type of crime, and punishment imposed, which exceeded the permissible scope of ER 609(a).

The State asserts that the additional details regarding Baird's prior conviction for false statement could have been admitted under ER 608. See Brief of Respondent ("BOR") at 7-10. The State cites to two cases in support of its position: State v. Clark, 143 Wn.2d 731, 24 P.3d 1006 (2001) and State v. Wilson, 60 Wn. App. 887, 808 P.2d 754 (1991). However, these cases are distinguishable and inapplicable.

ER 608(b) states:

**Specific Instances of Conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or

untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

In Clark, the court of appeals noted in dicta the trial court could have chosen to allow the defendant to question a witness about prior misconduct under ER 608(b), “but chose not to.” 143 Wn.2d at 767. Since the witness had already been impeached via ER 609 through “enumeration of each of his 36 prior convictions, [the trial judge] concluded further examination on the misconduct underlying some of those convictions would not be any more probative.” Id. Thus, it was found the trial court did not abuse its discretion in refusing to allow into evidence additional details of the circumstances surrounding the witness’s prior convictions. Id.

In this case, impeachment should have been sufficiently handled by the mere fact of Baird’s prior conviction for false statement. The presentation of evidence of Baird’s prior conviction should have been enough for impeachment purposes, just as it was in Clark. The dicta in Clark does not give support to the State’s assertion in this case that the trial court could have admitted all of the details of Baird’s prior conviction under ER 608. The language of ER 608 seems to contemplate this itself,

as it specifically appears to exclude ER 609 evidence as “other conduct” of a witness.<sup>1</sup>

The other case cited by the prosecution, State v. Wilson, does not mention ER 609 at all but rather only analyzes the application of ER 608. 60 Wn. App. 887. Wilson states there are limits to ER 608. Id. at 893. Impeachment under the rule “must be probative of truthfulness and not remote in time.” Id. Further, a trial court “should apply the overriding protection of ER 403 (excluding evidence if its probative value is outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury) . . . .” Id. Also, facts that go only to the credibility of the witness “may be elicited if [they are] germane to the issue.” Id. at 893 (citations and quotations omitted).

In Wilson the defendant claimed on appeal the trial court erred by allowing the State to impeach a witness with her prior false statement made under oath. Id. at 891. The prior false statement was not a conviction. Id. The witness—the defendant’s wife—had testified she was unaware of any abuse the defendant inflicted upon her sister. Id. at 891. And, if such abuse had occurred, the witness would have known about it since the defendant lived with her. Id. The State impeached the witness with DSHS

---

<sup>1</sup> “Specific instances of the conduct of a witness . . . other than conviction of crime as

financial assistance forms in which she previously claimed under oath the defendant did not live with her. Id. The appellate court concluded the impeachment was proper: the witness's testimony was germane to the issue of sexual abuse because she testified the defendant could not have committed the crime since he lived with her. Id. 893.

Wilson is distinguishable because the witness in that case did not have an actual conviction for making a false statement—rather, the State presented evidence a false statement had been made. Also in contrast to Wilson, Baird's impeachment here did not present facts that were germane to the defendant's case--so ER 608(b) could not apply. Baird's testimony centered on a conviction for a false statement, the additional details of which had nothing to do with the charges in the present case. The impeachment was not germane to the present action as those additional details about the conviction were collateral. Another example of this is found in State v. Griswold. 98 Wn. App. 817, 830-31, 991 P.2d 657 (2000) (abrogated on other grounds State v. DeVincentis, 150 Wn.2d 11, 74 P.3d 119 (2003)). There, the trial court did not err in refusing to allow impeachment of a witness with her previous misstatements as to why she

---

provided in Rule 609, may . . . if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness . . . ." ER 608(b).

could not help her friend deliver papers. Id. The statements were not germane to the current action. Id.

Finally, even if ER 608 could have been a basis to admit the facts surrounding Baird's prior conviction, the information could not have been admissible under ER 403. Wilson, 60 Wn. App. at 893. The questions regarding Baird's prior conviction involved facts concerning the defendant. RP 234-38. Baird testified she had been present when the defendant gave law enforcement a false name. RP 237. Such information was more prejudicial to this case than probative, confused the issues, and misled the jury. The information had nothing to do with the charges in this case and thus had no basis for admittance at trial.

The trial court in this case erred when it allowed into evidence information that went beyond the scope of ER 609. As argued previously, the error was not harmless.

**B. CONCLUSION**

For the reasons stated herein and in the Appellant's initial brief, the court should reverse the conviction for theft of a motor vehicle or reverse and remand for a new trial.

Respectfully submitted March 8, 2015,



---

s/Laura M. Chuang, WSBA No. 36707  
Of Counsel  
Attorney for Appellant

---

s/ David N. Gasch, WSBA No. 18270  
Gasch Law Office  
P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
FAX: None  
[gaschlaw@msn.com](mailto:gaschlaw@msn.com)

PROOF OF SERVICE

I, David N. Gasch, do hereby certify under penalty of perjury that on March 8, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Appellant's Reply Brief:

William P. McBride  
#834363  
PO Box 2049  
Airway Heights WA 99001

[AmandaP@co.whitman.wa.us](mailto:AmandaP@co.whitman.wa.us)  
Denis Paul Tracy  
Daniel F. LeBeau  
Whitman County Prosecutor  
P. O. Box 30  
Colfax, WA 99111-0030

---

s/David N. Gasch  
WSBA #18270