

No. 34352-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

David Daley,

Appellant.

Asotin County Superior Court Cause No. 16-1-00007-1

The Honorable Judge Scott Gallina

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT..... 1

I. The prosecution improperly elicited comments on Mr. Daley’s post-arrest silence in violation of his privilege against self-incrimination and his right to due process. 1

II. The trial court violated Mr. Daley’s constitutional right to introduce evidence of Deborah Turner’s bias..... 1

III. Mr. Daley’s burglary conviction violated his right to a unanimous verdict because the state explicitly relied on multiple acts and the court failed to give a unanimity instruction..... 3

IV. The court’s aggressor instruction misstated the law and improperly stripped Mr. Daley of his right to argue self-defense..... 4

V. The sentencing court failed to properly determine Mr. Daley’s offender score and standard range..... 4

VI. If the state substantially prevails, the Court of Appeals should decline to award any appellate costs requested. 4

CONCLUSION 4

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

In re Pullman, 167 Wn.2d 205, 218 P.3d 913 (2009)..... 3

State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008)..... 3

State v. Franklin, 180 Wn.2d 371, 325 P.3d 159 (2014) 3

State v. Spencer, 111 Wn. App. 401, 45 P.3d 209 (2002) 1, 2, 3

WASHINGTON STATE STATUTES

5A Wash. Prac., Evidence Law and Practice § 607.10 (6th ed.) 3

OTHER AUTHORITIES

ER 404 3

ER 608 2

ER 609 2

ER 613 3

ARGUMENT

I. THE PROSECUTION IMPROPERLY ELICITED COMMENTS ON MR. DALEY'S POST-ARREST SILENCE IN VIOLATION OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION AND HIS RIGHT TO DUE PROCESS.

Appellant rests on the argument set forth in the Opening Brief.

II. THE TRIAL COURT VIOLATED MR. DALEY'S CONSTITUTIONAL RIGHT TO INTRODUCE EVIDENCE OF DEBORAH TURNER'S BIAS.

An accused person "has a constitutional right to impeach a prosecution witness with bias evidence." *State v. Spencer*, 111 Wn. App. 401, 408, 45 P.3d 209 (2002).

At his trial for assaulting Deborah Turner and burglarizing her home, Mr. Daley had the right to introduce evidence that Turner asked three witnesses to falsely claim he hurt and sexually touched two young women. RP 288-290. The court's refusal to allow the evidence violated his constitutional rights. *Id.*

The evidence was offered to show bias. RP 288-290. A trial court commits "reversible error [by] deny[ing] a defendant the right to establish the chief prosecution witness's bias by an independent witness." *Id.*

The defendant need not first ask the witness about prior statements. *Id.*, at 408-411. In *Spencer*, the trial court improperly excluded evidence of bias on grounds that the defendant had failed to first cross-examine the witness about her prior statements. *Id.*, at 408.

The Court of Appeals reversed, explaining that “no foundation is needed to impeach a witness’s testimony with a prior statement as extrinsic evidence of bias.” *Id.*, at 409. Where bias evidence is concerned, “the witness has no right to be presented with the content of the testimony before it is offered.” *Id.*

Likewise, in this case, Mr. Daley was not obligated to cross-examine Turner or “present[] her with the content of the testimony before it [was] offered.” *Id.* Contrary to Respondent’s argument, he did not have to “give [her] an opportunity to deny or explain the alleged statement.” Brief of Respondent, p. 23. Whatever her motives, Turner’s efforts to get three people to falsely accuse Mr. Daley unequivocally showed bias. RP 288-290. The *Spencer* decision controls.¹

The trial court’s ruling excluding the evidence violated Mr. Daley’s constitutional rights. *Id.* His convictions must be reversed and the case remanded for a new trial. *Id.*

Respondent’s argument reflects a misunderstanding of bias evidence. Brief of Respondent, pp. 21-25 (citing ER 608 and ER 609). When evidence is “offered to show bias..., the restrictions in Rules 608

¹ Although Appellant’s Opening Brief cites *Spencer*, Respondent does not address it.

and 609 are inapplicable.” 5A Wash. Prac., Evidence Law and Practice § 607.10 (6th ed.)

Mr. Daley did not offer the testimony as character evidence or as a prior inconsistent statement. Brief of Respondent, pp. 21, 22-23 (citing ER 404(a) and ER 613). The proffered evidence was admissible to prove bias. *Spencer*, 111 Wn. App. at 408-411. It should have been admitted for that purpose. *Id.*

Respondent makes no attempt to argue that the error was harmless under any standard. Brief of Respondent, pp. 19-25. This failure may be taken as a concession. *See In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

The erroneous exclusion of highly probative bias evidence violated Mr. Daley’s constitutional rights. *Spencer*, 111 Wn. App. at 408-411. The error was not harmless beyond a reasonable doubt, and requires reversal and remand for a new trial. *Id.*; *see State v. Franklin*, 180 Wn.2d 371, 378, 325 P.3d 159 (2014); *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

III. MR. DALEY’S BURGLARY CONVICTION VIOLATED HIS RIGHT TO A UNANIMOUS VERDICT BECAUSE THE STATE EXPLICITLY RELIED ON MULTIPLE ACTS AND THE COURT FAILED TO GIVE A UNANIMITY INSTRUCTION.

Appellant rests on the argument set forth in the Opening Brief.

IV. THE COURT'S AGGRESSOR INSTRUCTION MISSTATED THE LAW AND IMPROPERLY STRIPPED MR. DALEY OF HIS RIGHT TO ARGUE SELF-DEFENSE.

Appellant rests on the argument set forth in the Opening Brief.

V. THE SENTENCING COURT FAILED TO PROPERLY DETERMINE MR. DALEY'S OFFENDER SCORE AND STANDARD RANGE.

Appellant rests on the argument set forth in the Opening Brief.

VI. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

Appellant rests on the argument set forth in the Opening Brief.

CONCLUSION

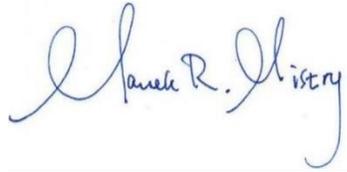
Mr. Daley's convictions must be reversed and the case remanded for a new trial.

Respectfully submitted on May 17, 2017,

BACKLUND AND MISTRY



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A handwritten signature in blue ink that reads "Manek R. Mistry". The signature is fluid and cursive, with the first name "Manek" and last name "Mistry" clearly legible.

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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:

David Daley, DOC #386405
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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 May 17, 2017.



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