

FILED
Court of Appeals
Division III
State of Washington
5/1/2018 3:43 PM

NO. 35000-2-III
Corrected copy

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DELBERT BENSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WALLA WALLA COUNTY

APPELLANT'S REPLY BRIEF

NANCY P. COLLINS
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WASHINGTON APPELLATE PROJECT
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A. ARGUMENT.

1. The prosecution's brief misrepresents critical facts and fundamentally distorts the evidence presented to the jury.

First and foremost, the prosecution's brief selectively quotes from a transcript prepared as an aid for this Court's review of the record on appeal. This transcript was not presented to the jury and did not exist at the time of the jury trial. The jury received only an audio-recording, Exhibit 3.¹ The jury did not receive the audio-recording to listen to at its leisure during deliberations: the court played it at their request once, in the courtroom, when they were deliberating. RP 417-18 (court explains process if jury asks to listen to Ex. 3); RP 421 (jury asks to listen to recording); RP 426 (jury asks to listen to entire recording, one and one-half hours).

While the transcript names who the court reporter believed was speaking, the names are guesswork added by the court reporter for ease of reading. No one put their names on the record as they would in court. Instead, the court reporter tried to figure out who was speaking after asking counsel for names of the various known participants in the

¹ RAP 9.1 requires a typewritten report of proceedings for any oral proceeding. RAP 9.2 places the burden of producing the record on the appellant.

conversation.² The accuracy of the attributions may not be taken at face-value. Mr. Benson never reviewed it. The jury did not have this transcript. The parties did not litigate who was speaking at what time with the specificity provided in this post-trial transcript.

The defense argued to the jury that when a voice says, “I can’t help you out,” this statement was made in the course of a failed effort to purchase drugs from Mr. Gant. RP 402. The post-trial transcript attributes this statement to Mr. Armour, but there is no reason to defer to the court reporter’s guesswork on the speaker’s name. The recording itself is hard to hear and the words are hard to ascertain. The prosecution cannot now claim to have proven what was on a written transcript that it did not offer in court.

Second, the prosecution gives an erroneous explanation of the critical facts underlying whether it proved Mr. Benson bought drugs from Mr. Gant, as opposed to lying to the police about whether he bought drugs from Mr. Gant. Two police officers testified for the prosecution and neither officer saw what Mr. Benson did inside or

² Because appellate counsel is required to provide transcript of oral proceedings, counsel sought a transcript of Ex. 3. The court reporter was not present at trial and asked appellate counsel about the names of the people involved in the conversations. The correspondence appellate counsel had with

outside of the home where he met with John Gant and several other people.

Detective Bolster did not know exactly where Mr. Benson parked his truck by John Gant's home because he could not see Mr. Benson from his vantage point. RP 237-38. Detective Bolster agreed Mr. Benson's vehicle was "out of [his] line of sight" and he said, "I don't know where they actually parked." RP 238. He could neither see inside the building nor see Mr. Benson's parked truck.

Officer Harris similarly said Mr. Benson turned into the drive of Mr. Gant's residence, and "it's pretty dark back there. And once he went in there I pretty much didn't see anything." RP 297. Officer Harris parked on a different street, "where I could pick him up as he left" and would be driving away. RP 298; *see* RP 321 (Officer Harris said he could hear but "I did not see" what was going on); RP 323 (Officer Harris said, "I did not see them get in the vehicle" when leaving Mr. Gant's).

The officers did not claim that anything they heard on the wire was different from the recording admitted into evidence.

the court reporter occurred over email and is attached as Appendix A, p. 2.

No police officer watched a purported drug exchange occur and no officer saw Mr. Benson leaving the building and getting into his truck. Thus, no officer saw whether he took his own drugs out of the truck and put them into a container that he gave to police to pretend he made the drug sale that he promised to make. The officers did not see a drug sale or see that it was impossible for Mr. Benson's explanation to be true. Instead, they used Mr. Benson's later, brief, statements and guesswork from listening to the recording to hypothesize about what happened. The significance of the prosecution's failure to offer the necessary direct and positive testimony about what happened between Mr. Benson and Mr. Gant is discussed below.

2. The prosecution asks this Court to disregard or overturn long-established principles setting a specific threshold of proof for a perjury conviction.

Long-rooted common law and statutory requirements “put perjury and treason in a class by themselves” in mandating an unusually high threshold of proof necessary to sustain a conviction. *State v. Wallis*, 50 Wn.2d 350, 353, 311 P.2d 659 (1957). In addition to proving a person knowingly made a materially false statement under oath in an official proceeding, as set forth by statute, the prosecution must also offer: (1) “direct testimony of at least one credible witness” that is

“positive and directly contradictory of the defendant’s oath”; and (2) “another such witness or corroborating circumstances established by independent evidence” that “clearly . . . overcome[s] the oath of the defendant and the legal presumption of his innocence. Otherwise the defendant must be acquitted.” *State v. Rutledge*, 37 Wash. 523, 528, 79 P. 1123 (1905).

The prosecution claims the existence of a recording obviates the need for it to offer witness testimony satisfying the heightened threshold proof requirements for perjury, relying on *State v. Singh*, 167 Wn. App. 971, 275 P.3d 1156 (2012).

But in *Singh*, an audio-recording definitively established the falsehood at issue: the defendant denied she had a specific conversation about the witnesses in a case against her brother but the jail recorded her having this very conversation with her brother. *Id.* at 973-74. The perjury in *Singh* rested on uttering statements in a recorded conversation and then uttering directly contrary statements under oath in court. *Id.* at 974. After a bench trial, the judge ruled the recording showed that in court, the defendant gave “demonstrably not true statements” and through this recording offered the necessary direct and positive statements required to prove perjury. *Id.* at 975.

Unlike *Singh*, the recording here does not definitively establish the falsehood at issue. The recording contains one and one-half hours of talk Mr. Benson had with others and its quality is far from direct and clear. Ex. 3. It is hard to hear and it is difficult to guess who is talking. *Id.* Conversation topics constantly change. *Id.* While the State cherry-picks from the post-trial transcript to erroneously convey what was occurring during the one and one-half hour long tape recording, the exhibit played for the jury does not give a demonstrably clear, direct testimony about what occurred inside a building between Mr. Benson and others or outside the building when Mr. Benson got into his truck.

And unlike *Singh*, the perjury required the State to prove Mr. Benson did something (buy drugs from John Gant) but the audio recording does not definitively capture this conduct. The recording does not show whether Mr. Benson actually exchanged drugs for money with Mr. Gant. At most, it shows the men discussing quantity and price in a conversation that skips around nonsensically. Circumstantially, the prosecution claims jurors could infer from this recording that a drug sale took place. But contrary to *Singh*, the words on the recording do not meet the threshold requirements of the established high threshold for a perjury conviction.

To satisfy the essential elements of perjury, “corroborating evidence must be inconsistent with the defendant’s innocence.” *State v. Arquette*, 178 Wn. App. 273, 286, 314 P.3d 426 (2013). A direct witness must establish the falsity of the accused’s testimony by firsthand knowledge, not by inference. *Id.*

The officers who were listening to the wire had no ability to observe what was happening. RP 237-38, 297-97. They could not see Mr. Benson even when he left the building and got into his truck. RP 237-38, 298. The recording does not indicate Mr. Benson did not retrieve drugs from his truck as he said he did. Ex. 3. It contains noise, static, and conversation that is unclear about what is occurring. *Id.* The prosecution did not supply the requisite direct and positive testimony but instead relied on inference combined with Mr. Benson’s explanations of what happened. The prosecution did not meet its burden of proving perjury.

3. The jury instructions did not make the controlling law manifestly apparent to the average juror.

It is well-established that the jury has the “right” to rely on the to-convict instruction as “complete statement of the law” and the failure to provide a complete and accurate to-convict instruction is a

“constitutional defect.” *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). The to-convict instruction “carries with it a special weight” because it affirmatively represents itself as the yardstick by which the jurors measure whether the prosecution has proven its case. *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005).

Furthermore, the law must be manifestly clear to the jury. *State v. Kylo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009). Jurors are lay people, not judges, and are not expected to parse when jury instructions that may be contradictory or misleading. *State v. Ring*, 52 Wn.2d 423, 327, 325 P.2d 630 (1958) (“instructions are to be given to and understood by lay jurors and the instruction in its present form might tend to confuse a juror as to his fundamental duty.”).

Here, the to-convict instruction set forth the statutory elements of perjury but did not tell the jurors of the common law elements that the prosecution must produce direct testimony of two witnesses proving the materially false testimony by the accused or at least one witness with personal knowledge plus independent corroborative evidence showing the falsity of the accused person’s testimony. CP 177.

Instruction 7 was not a sufficient replacement, contrary to the prosecution’s argument, because the essential requirements of proof

must be in the to-convict instruction. *See State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005).

Furthermore, there is a contradiction between the mandatory direct testimony for a perjury conviction and Instruction 5, the general instruction that tells jurors circumstantial evidence should be treated the same as direct evidence. CP 171, 173. Instruction 5 tells jurors that circumstantial evidence is legally identical in both “weight and value” as direct testimony, undercutting the comments in Instruction 7, which explains perjury requires testimony that directly and positively contradicts the allegedly false statement. *Id.*

These instructions did not make the law essential to proving perjury manifestly apparent to the jurors and instead misled them about the prosecution’s burden of proving Mr. Benson committed the charged offense.

4. Mr. Benson was charged with a single false statement but the jury was never instructed that its verdict must rest on this specific falsehood.

Because it is solely the court’s role to instruct the jury on the law, jurors are told to disregard all comments or arguments by counsel that are not supported by the court’s instructions. CP 166 (instructing

jurors they “must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.”).

The State charged Mr. Benson with making a specific false statement under oath, “that he did not purchase drugs from John Gant on October 30, 2012,” but the court did not instruct the jury that their consideration of the perjury charge was limited to that specific falsehood. CP 122. The to-convict instruction asked jurors to find only that Mr. Benson “made a false statement” on June 26, 2013. CP 166.

The State introduced a host of statements Mr. Benson made when testifying on June 26, 2013, and the jury heard testimony that many of them were not true. The reason the defense counsel spent so much time trying in his closing argument urging the jury to disregard the many falsehoods Mr. Benson allegedly made was because it was not clear what false statement the prosecution was relying upon. Because the court never told the jury that the perjury conviction must rest on the specific false statement alleged, and the prosecution relied on attacking Mr. Benson’s credibility, the jury was free to convict him for an uncharged crime, this undermining the jury’s verdict and depriving Mr. Benson of his right to fair notice of the allegation against him.

5. The prosecution's efforts to dilute or confuse its burden of proof also require reversal.

Defense counsel objected to the prosecution trivializing its burden during closing argument. At the end prosecutor's rebuttal closing argument, he analogized this case to a trial "about whether or not a boat existed," then described the defense as nitpicking about the number of masts. RP 413. The prosecution told the jurors, "all you have to decide is, is it a boat, and will it float." *Id.* The court quickly overruled the defense objection and told the prosecution to "go ahead." *Id.*

In its response brief, the prosecution blames the defense for objecting, claiming it confused the prosecutor and "interrupted the flow." Resp. Brief at 23. But the prosecutor appeared to have completed his analogy about the boat and whether it will float. RP 413. The defense is required to object when the prosecution encourages jurors to dilute the State's burden of proof or misrepresents the presumption of innocence. Trivializing the burden of proof is improper. *State v. Lindsay*, 180 Wn.2d 423, 436, 326 P.3d 125 (2014) (ruling prosecution improperly analogized the State's burden to an incomplete jigsaw puzzle or crossing the street).

The prosecution contends it needed to draw this forced analogy about the case as akin to whether a boat will float because the jury might have be confused about what it needed to decide due to the many bits of evidence indicating Mr. Benson lied about various things. Resp. Brief at 24-25. But the proper mechanism for ensuring the jury was focused on whether the prosecution proved the charged instance of perjury would have been to instruct the jury on the precise statement at issue. Having failed to seek accurate and complete jury instructions that asked them to decide the precise false statement charged in the information, the prosecution is not entitled to diminish its burden of proof by likening the jury's role to deciding whether a boat floats.

Viewing this impropriety together with the instructional error and insufficient evidence to meet the high threshold to prove perjury, reversal is required.

B. CONCLUSION.

Mr. Benson's conviction for perjury should be reversed and dismissed due to insufficient evidence. Alternatively, a new trial should be ordered.

DATED this 1st day of May 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Nancy P. Collins", written in a cursive style.

NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX A

Maria Riley

From: Maria Riley
Sent: Wednesday, September 27, 2017 8:50 AM
To: Erica L. Ingram
Subject: JUDGE INFO RE: STATE V. DELBERT BENSON, COA 35000-2

Hi again,
The presiding judge was **HONORABLE JOHN W. LOHRMANN**.

Maria

Sent from my iPhone

On Sep 27, 2017, at 4:35 AM, Erica L. Ingram <inquiries@aquoco.co> wrote:

Hello there,

I am just sending this again because I didn't hear from you yesterday and this is due to the court pretty soon.

Thanks,

Erica.

From: Erica L. Ingram [<mailto:inquiries@aquoco.co>]
Sent: Tuesday, September 26, 2017 11:43 AM
To: 'Maria Riley' <maria@washapp.org>
Subject: Re: State v. Delbert Benson 35000-2 | 15-1-00081-8

Hello there,

I apologize for not asking these two questions last time; I have completely finished with the transcript of Trial Exhibit 3 from the November 1, 2016 hearing except to ask who the judge was who presided over the hearing on November 1st, 2016. I would like to place his or her name on the cover page.

Also, to clarify; the appearances at the hearing were Mr. Nagle for the State and Ms. Chen for the Defendant? I am putting that information on the cover page as well and those were the two attorneys on the service for the SoA.

I will give you a heads up; there are a lot of indiscernibles. I did my best to work them out, but regardless there are still a lot.

If you can get back to me with these two pieces of information, likely I can get the transcript back to you within an hour. I will refrain from filing it until the morning of the 28th so you have what's left of today when I send it and tomorrow to look it over if you wish.

Thank you very much and have a great day.

Sincerely,

<image001.jpg>

Erica L Ingram

Certified Electronic Court Reporter & Transcriber, CERT**D-521

Notary Public in and for the State of Washington

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From: Maria Riley [<mailto:maria@washapp.org>]

Sent: Friday, September 22, 2017 9:12 AM

To: Erica L. Ingram <inquiries@aquoco.co>

Subject: Fwd: TRANSCRIPTION REQUEST FOR AUDIO EXHIBIT: STATE V. DELBERT BENSON, COA 35000-2

Hi Erica,

Forwarding you the attorney's response.

Thank you!

Maria

Sent from my iPhone

Begin forwarded message:

From: Nancy Collins <nancy@washapp.org>

Date: September 22, 2017 at 8:52:51 AM PDT

To: Maria Riley <maria@washapp.org>

Subject: RE: TRANSCRIPTION REQUEST FOR AUDIO EXHIBIT: STATE V. DELBERT BENSON, COA 35000-2

Exhibit 3 was played on Nov. 1, 2016 (pages 22-25 of the trial transcript, Vol. 2), and again during jury deliberations on Nov 3, 2016.

My understanding of the trial testimony is that there may be some dispute about who the speakers were, so it would be better to identify by number and not name (witness testified that speakers at the start were Mr. Benson, Sergeant Bolster, and later Wade Armour and John Gant, plus an unknown female, but I do not know if this is correct)

Nancy P. Collins

Washington Appellate Project
(206) 587-2711
www.washapp.org

From: Maria Riley
Sent: Friday, September 22, 2017 8:35 AM
To: Nancy Collins
Subject: Fwd: TRANSCRIPTION REQUEST FOR AUDIO EXHIBIT: STATE V. DELBERT BENSON, COA 35000-2

Hi Nancy,

Forwarding you the transcriber's question re this exhibit. Just let me know and I will send the answer to her.

Maria

Sent from my iPhone

Begin forwarded message:

From: "Erica L. Ingram" <inquiries@aquoco.co>
Date: September 22, 2017 at 8:16:53 AM PDT
To: 'Maria Riley' <maria@washapp.org>
Subject: RE: TRANSCRIPTION REQUEST FOR AUDIO EXHIBIT: STATE V. DELBERT BENSON, COA 35000-2

Hey there,

I am just following up because I want you to know I am nearly done. But I also have two questions. I was wondering if you want me to use names to identify the people or if you just want me to identify them by 'female/male speaker 1", 2, 3, et cetera?

Also, I don't know what time and date this is played in court (like beginning and end time it plays in the trial day). Do you happen to know that? I would like to put it on the cover page.

Thanks,

Erica.

From: Maria Riley [<mailto:maria@washapp.org>]
Sent: Wednesday, August 30, 2017 2:04 PM
To: Erica L. Ingram <inquiries@aquoco.co>
Subject: RE: TRANSCRIPTION REQUEST FOR AUDIO EXHIBIT: STATE V. DELBERT BENSON, COA 35000-2

Thank you so much!

Maria

From: Erica L. Ingram [<mailto:inquiries@aquoco.co>]
Sent: Wednesday, August 30, 2017 1:21 PM
To: Maria Riley <maria@washapp.org>
Subject: RE: TRANSCRIPTION REQUEST FOR AUDIO EXHIBIT: STATE V. DELBERT BENSON, COA 35000-2

Hello there,

Thank you; I did get that and we are all good; I believe we have everything we need. Once I finish it, if I need any spellings or anything, I will touch base with you at completion time if I can't find anything (or just send the transcript if I don't need any spellings). Thank you very much and have a great day.

Sincerely,



Erica L Ingram
Certified Electronic Court Reporter & Transcriber, CERT**D-521
Notary Public in and for the State of Washington
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From: Maria Riley [<mailto:maria@washapp.org>]
Sent: Wednesday, August 30, 2017 9:32 AM
To: Erica L. Ingram <inquiries@aquoco.co>
Subject: TRANSCRIPTION REQUEST FOR AUDIO EXHIBIT: STATE V. DELBERT BENSON, COA 35000-2
Importance: High

Ms. Ingram,

Attached is a letter requesting transcription in the above-referenced appeal and the statement of arrangements. The audio file has been uploaded via your website yesterday.

Please acknowledge receipt of this request by return e-mail.

Thank you,

Maria Arranza Riley

Staff Paralegal

Washington Appellate Project

Phone: (206) 587-2711

Fax: (206) 587-2710

E-mail: maria@washapp.org

Website: www.washapp.org

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 35000-2-III
)	
DELBERT BENSON,)	
)	
Appellant.)	

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<input checked="" type="checkbox"/> TERESA CHEN [tchen@co.franklin.wa.us] ATTORNEY AT LAW PO BOX 5889 PASCO, WA 99302-5801	() () (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
<input checked="" type="checkbox"/> DELBERT BENSON 336803 AIRWAY HEIGHTS CORRECTIONS CENTER PO BOX 2049 AIRWAY HEIGHTS, WA 99001	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 1ST DAY OF MAY, 2018.

X _____ 

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WASHINGTON APPELLATE PROJECT

May 01, 2018 - 3:43 PM

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