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Court of Appeals
Division III
State of Washington
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COURT OF APPEALS NO. 35722-8-III

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

STATE OF WASHINGTON

V.

MICHAEL OWEN,

Appellant.

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

The Honorable Scott R. Sparks, Judge

REPLY BRIEF OF APPELLANT

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A. STATEMENT OF FACTS IN REPLY

As indicated in the opening appellate brief, following closing arguments, the defense moved to dismiss on grounds none of the witnesses identified the defendant as the Michael Owens they testified about. RP 387. The state argued identify of names sufficed and the court agreed. RP 388

Prior to sentencing, the defense renewed its motion to dismiss on grounds identity of names is insufficient. RP 403. The prosecutor argued there was circumstantial evidence identifying the defendant as the person the witnesses were talking about. RP 404. In that vein, the prosecutor alleged that Angela Cauchon looked directly at the defendant while testifying about how she knew Michael Owen. RP 404. The prosecutor also alleged Christie Templeman “walked into the courtroom, looked at Mr. Owen, sat on the chair and turned her back completely to him and refused to look at him for the rest of her testimony.” RP 405. The prosecutor acknowledged this was “not on the record,” however. RP 404.

Defense counsel in no way agreed to the prosecutor’s recollection. RP 405-06.

There is no evidence the court resolved these allegations in the state's favor, as the court's oral ruling seems to say the record speaks for itself.

THE COURT: I appreciate very much, Mr. Alford, [INAUDIBLE].

(NOTE: THE COURT'S MICROPHONE IS EITHER OFF, MALFUNCTIONING, OR MALPOSITIONED; INAUDIBLES ARE SO NOTED.)

THE COURT: The record is clear enough [INAUDIBLE]. Okay? So [INAUDIBLE].

RP 406. No written findings were entered.

B. ARGUMENT IN REPLY

1. THE STATE FAILED TO PROVE THE DEFENDANT WAS THE "MIKE" THE WITNESSES TALKED ABOUT.

In his opening brief, appellant Michael Owen argued the state failed to prove he was the person who committed the offense. Brief of Appellant (BOA) at 10-16. No one at trial ever identified the defendant (appellant herein) as the Mike or Mike Owen they were talking about, and identity of names is insufficient evidence to establish identity. BOA at 14; State v. Huber, 129 Wn. App. 499, 119 P.3d 388 (2005).

In response, the state concedes there was no in-court identification of Owen as the person who committed the offense. BOR at 14, 17. Nonetheless, the state claims there is circumstantial evidence establishing the defendant as the person who committed the offense. Id.

First, the state argues that the cases relied upon by Owen are inapposite because the witnesses here were well acquainted with the defendant. But what the state proved at trial was that the witnesses were acquainted with someone named Mike or Michael Owen. The state never established a nexus between that person and the defendant, other than identity of names. None of the witnesses testified the defendant was in fact the Michael Owen of whom they spoke.

The state claims Angela Couchon looked at the defendant several times while testifying about how she knew Michael Owen. The state cites nothing in the record to support this allegation, however. BOR at 19. While the state made this allegation at the hearing on the defense motion to dismiss, the court made no factual finding in this regard. Thus, it must be presumed the state did not carry its burden of proof as to this fact. See State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997); Car Wash

Enters., Inc. v. Kampanos, 74 Wn. App. 537, 546, 874 P.2d 868 (1994) ("The absence of a finding of fact in favor of the party with the burden of proof about a disputed issue is the equivalent of a finding against that party on that issue"). The state's bare assertion regarding Christie's testimony suffers from the same fatal flaw.

The state is essentially asking this Court to assume the state proved its case as a matter of common sense. BOR at 19 ("What the record does not show in writing, common sense clearly dictates[.]") This Court should decline to do so as Due Process requires the state to prove identity, not by supposition, but by evidence establishing the fact beyond a reasonable doubt. State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974).

2. THE COURT ERRED IN EXCLUDING RELEVANT DEFENSE EVIDENCE.

Appellant Mike Owen is a tall Caucasian man with red hair. CP ___ (sub. no. 1, Personal Information, 2/16/17).

S.C. testified she does not know what Mike looks like. RP 274. However, she gave an interview to co-defense counsel Etoy Alford, Jr., in which she identified Mike as dark skinned and bearded. RP 274. When asked if she remembered giving the

interview, S.C. testified she did not. RP 269. She did not remember telling Alford Mike has dark skin and a beard. RP 274.

At the close of the state's case, defense counsel James Kirkham sought to admit the interview with Alford as impeachment. RP 340. Kirkham argued the portion of the interview where S.C. described her attacker as having dark skin, a beard and living in a tent should be admitted.¹ RP 341. When the court said it had not seen the interview, Kirkham responded: "We have a copy if you'd like to listen to it." RP 342.

The court thereafter listened to the interview and denied its admission on grounds it was not addressed at the child hearsay hearing and because Mr. Alford appeared to have a "hearing problem" and asked S.C. direct, rather than open-ended questions. RP 342-44.

On appeal, Owen argued the court abused its discretion and deprived him of his right to present relevant defense evidence by excluding the aforementioned portion of the interview because it was admissible as non-hearsay under ER 801(d) as a statement of identification of a person made after perceiving the person. BOA at

¹ The state is incorrect that the defense sought to admit the whole interview. See BOR at 22.

16-22 (citing State v. Stratton, 139 Wn. App. 511, 161 P.3d 448 (2007)).

In its response, the state does not address ER 801(d).

Rather, the state argues:

Noticeable absent from the record on appeal is any transcript of the recorded interview of S.C. by Mr. Alford and or any witness who could testify about that recording; instead we have a reference in the transcript to the interview.

BOR at 21.

The state is incorrect. The court admitted the CD and transcript as exhibits. RP 344. Pursuant to undersigned counsel's supplemental designation, the CD and transcript of the interview were indexed. See attached supplemental designation and index. And Acords indicates this Court received the exhibits.

Regardless, defense counsel's offer of proof was sufficient. See e.g. State v. Kilgore, 147 Wn.2d 288, 295, 53 P.3d 974 (2002) (When ruling on a motion to exclude evidence under ER 404(b), a trial court may rely on State's offer of proof to establish the fact of misconduct by a preponderance of the evidence.) Moreover, defense counsel's offer of proof is sufficient to show prejudice. BOA at 22.

3. OWEN WAS DEPRIVED OF HIS RIGHT TO A UNANIMOUS JURY VERDICT.

In his opening appellate brief, Owen argued he was deprived of his right to a unanimous verdict because there was evidence of two touches that could have formed the basis for the single charge – one at the pool and one at Christie’s home on the green recliner. The state did not elect which of the two acts jurors should rely upon to convict, and the court did not give the jury a unanimity instruction. BOA at 26-29.

The state points out S.C.’s testimony about the pool incident came out on cross-examination by the defense. The state argues defense counsel “opened the door and could have requested a limiting instruction, but did not do so.” BOR at 24.

The state seems to suggest that defense counsel somehow waived Owen’s right to jury unanimity by accidentally eliciting an act the state did not know about or intend to elicit. That can’t be the rule. Indeed, the state cites no authority for its novel waiver argument.

S.C. was the state’s witness. It’s the state’s job to ensure a fair trial. The problem is not in the elicitation of the pool evidence but what was done with it afterward. Under the case law, the

prosecutor needed to elect an act in the absence of an instruction. That did not occur, and the error is presumed prejudicial.

Next the state argues that because closing arguments focused on the recliner incident, “there is not a reasonable likelihood this statement by her [about the pool] in the trial could have formed the basis for a non unanimous verdict on the child molest charge.” BOR at 24. But the error in failing to require unanimity is prejudicial unless the evidence offers no basis for the jury to rationally discriminate between multiple acts. State v. Bobenhouse, 166 Wn.2d 881, 894-95, 214 P.3d 907 (2009). As Owen argued in his opening appellate brief, there was a basis for the jury to discriminate between the reported pool touching and the reported recliner touching. BOA at 29 (pointing out reasons to doubt recliner incident and reasons to doubt pool incident). For these reasons – completely unaddressed by the state – Owen’s conviction must be reversed.

D. CONCLUSION

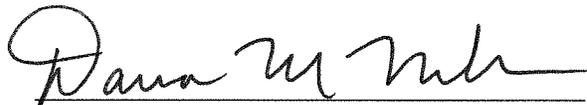
For the reasons stated in the opening brief and this reply, this Court should reverse Owen’s conviction. Alternatively, this Court should remand his sentence and require the sentencing court to modify the sentencing condition prohibiting appellant from having

contact with his own minor daughters. As argued in the opening brief, this condition overburdens his right to parent.

Dated this 30th day of January, 2019

Respectfully submitted

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "Dana M. Nelson". The signature is written in a cursive style with a large initial "D" and "N".

DANA M. NELSON, WSBA 28239

Office ID No. 91051

Attorneys for Appellant

THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KITTITAS COUNTY

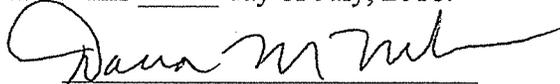
STATE OF WASHINGTON,)	
)	
Plaintiff,)	CAUSE No. 17-1-00048-4
)	
vs.)	DESIGNATION OF
)	CLERK'S PAPERS --
MICHAEL OWEN,)	AND EXHIBITS --
)	
Defendant.)	SUPPLEMENTAL
_____)	COA No. 35722-8-III

TO: Superior Court Clerk

Please prepare and transmit to the Court of Appeals, Division Three, the following exhibits.

<u>Ex no.s</u>	<u>Description</u>
101	CD
102	Transcript

DATED this 25th day of July, 2018.



DANA M. NELSON, WSBA No. 28239
NIELSEN, BROMAN & KOCH
Office ID No. 91051

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KITTITAS COUNTY

State of Washington,)
Plaintiff(s)-Respondent(s),) Trial Court No. 17-1-00048-4
vs.) Appeals No. 35722-8
Michael Owen,)
Defendant(s)-Appellant(s).) INDEX TO EXHIBITS
Designation of Clerk's Papers
Requested By:
(per Designation filed July 30, 2018)

Exhibit Name		Exhibit No.
CD		101
Transcript		102

NIELSEN, BROMAN & KOCH P.L.L.C.

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Transmittal Information

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Appellate Court Case Title: State of Washington v. Michael Charles Owen, Jr.
Superior Court Case Number: 17-1-00048-4

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