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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36543-3-III

STATE OF WASHINGTON, Respondent,

v.

JASON RAY WEISKOP, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

In his trial for first degree robbery, the identity of Jason Staggs¹ as the alleged perpetrator was the primary issue in dispute. Staggs sought to introduce medical evidence concerning the victim's blood alcohol content of 0.297 when he was hospitalized shortly after he was stabbed by the assailant. Because the evidence was relevant to the victim's ability to accurately perceive and recall the events of the attack and to impeach his credibility when he reported only consuming a few beers, the trial court's exclusion of the evidence deprived Staggs of his ability to present a defense.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The trial court erred in excluding probative defense evidence about the victim's blood alcohol content shortly after the incident.

¹ Appellant's legal name is Jason Staggs; Weiskop is the name of his stepfather. RP 6. According to his trial counsel, the first time he was arrested, he was booked under the name Weiskop but he was never formally adopted, and the name "Weiskop" continued to be associated with him after that. RP 8. Although the case is captioned under the name "Weiskop," this brief will refer to the Appellant by his true legal name in light of its usage throughout the lower court proceedings.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether a witness's blood alcohol content is relevant to impeach a victim's ability to accurately perceive and recall events.

ISSUE NO. 2: Whether a witness's elevated blood alcohol content is relevant to impeach the victim's credibility when the victim testified he had only consumed a few beers.

ISSUE NO. 3: Whether an unfairly prejudicial effect of introducing a witness's blood alcohol content significantly outweighs the probative value of the evidence.

IV. STATEMENT OF THE CASE

On the evening of February 12, 2018, Scott Flory was walking to the Moezy Inn to play pool in a weekly tournament. RP 55-56. He was carrying a black case that contained two pool cues. RP 58. A dark vehicle driven by a female came around the corner and two male passengers jumped out and accused Flory of stealing the case off a porch. RP 58. Flory started to walk away and felt that he was pushed in the back. RP 59. When he turned around, they asked what his problem was and told him to open the case. RP 59. He showed them the pool stick and put it down when they told him to. RP 59. The man who pushed him told him to walk

away “or I’ll stick you again.” RP 61. At some point, one of the men started walking away. RP 59.

After Flory put the case down, he was told to walk away and leave it, and he said no. He was then pushed in the chest. At that point, Flory got angry and picked up the pool cues. RP 59. He heard someone say, “Let’s get out of here,” and the second man began walking away after the first, who was already about half a block away. RP 60. Carrying his pool cues, Flory walked backwards for a couple of blocks before he realized he felt cold. RP 61. He put his hand inside his coat and realized he was bleeding. RP 62.

Flory walked about another five blocks to the Moezy Inn and told them he had been stabbed. RP 62-63. Somebody called 911 and Flory was taken to the hospital in an ambulance. RP 63. He received six stitches to close the wounds in his chest and back, but none of his organs were affected. RP 64, 245, 247, 251. Testing done at the hospital showed that Flory had alcohol as well as opiate and cocaine metabolites in his system, and that his blood alcohol level was .297. RP 17, 230, 231.

A police officer interviewed Flory at the hospital. RP 174, 178. Flory told the officer what happened and identified the man who stabbed him as the one who had been in the front passenger seat of the car. RP

181. He described the assailant as a white male, five feet and six or seven inches tall, weighing about 150 pounds, in his early to mid-40's, with red hair and a red beard. RP 155, 180, 185.² He repeated this description a few days later to a detective assigned to the case. RP 152, 154, 155.

Flory spoke to his daughter Jaimee Parker about the stabbing incident and she posted a request on Facebook for help. RP 166-67. One day while she was out, Daniel Stickney approached her and told her he knew who stabbed her dad. RP 168. Stickney said that Jason Staggs, his cousin, was drunk and needed money. RP 168. Stickney denied involvement, saying that he had nothing to do with it and was just standing there when Staggs stabbed Flory “before he could even think about anything.” RP 168. Parker told Stickney that she would have to tell her dad and that he needed to be man enough to talk to Flory about it. RP 169. She promised Stickney that he would be ok if he told Flory what he knew. RP 170.

Subsequently, Flory contacted Stickney through Facebook and told him, “ok kid u have to come clean..or my friends will find you.”³ *Trial*

² Trial testimony established that while Weiskop has sometimes sported a short red goatee, he is 37 years old, five feet nine inches, 159 pounds, and has sandy blond hair. RP 206.

³ The messages contain a variety of spelling, grammatical, and typographical errors, but are repeated verbatim in this briefing due to the messages being rendered difficult to read with the text corrections noted inline.

Exhibit 6. Stickney responded, saying “It was Jason Stags I told him he was stupid and to stop the fucker was drunk.” *Trial Exhibit 8.* Flory asked Stickney to testify and he refused, saying, “I’m a criminal why would I do that that would make me a rat and that I am not. Now if you want to get him back then I’ll help but I’m not gonna testify on a stand for shit.” *Trial Exhibits 12, 13.* After Flory assured Stickney that Flory would protect him and asked him to come clean, Stickney told him,

we were on our way to the store Jason was drunk as fuck. He seen you walking down the street was like watch this he has a violent I told him to stay in truck and to leave you alone I was hungry he wouldn’t listen and made my girl stop the truck he hopped out and started to say something to you why I was getting my shit together and in my backpack after that my girl drove off cuz I noticed him hit you well I thought he hit you and he was telling you to drop your shit I was telling him to come on some one is on there porch watching him he still wouldn’t stop and then stabbed you a second time that’s when we left and I freaked out on him cuz he was being drunk and stupid.

Trial Exhibits 16, 18-20.

Flory viewed Stags’s Facebook profile a couple of times to identify him. RP 117-18. One week after the stabbing, he contacted police and told the officer about the conversation with Stickney, allowing the officer to photograph the text exchanges. RP 159, 161-62. Because Flory had looked at Stags’s Facebook profile and was given his name by Stickney, the officer did not show Flory a photo line-up. RP 161.

Thereafter, the State charged Staggs with conspiring with Stickney to commit first degree robbery and attempted first degree robbery, both carrying firearm enhancements. CP 29-30. The State also charged Stickney in the attack on Flory, and he ultimately pleaded guilty to second degree assault and received a 22-month prison sentence. RP 136-37. Staggs, however, proceeded to trial.

On the day of trial, Flory appeared to the parties to be intoxicated. RP 31. Although his breath smelled of alcohol, he denied drinking that day and became upset when questioned by defense counsel. RP 33, 35. He testified about the events of February 12 and described the attacker as a 5-foot 4-inch tall man in his early to mid-30s with a short red beard. RP 56, 72-73, 106-07. On direct examination, the State asked Flory if he had been drinking on February 12 and he acknowledged that he had but denied that his recollection was impaired. RP 101-02. On cross-examination, he estimated that he drank 4 or 5 beers. RP 103.

At the close of the State's case, the trial court granted a defense motion to dismiss the first count alleging conspiracy. RP 219, 224; CP 57. The State also moved to prohibit the defense from inquiring about Flory's blood alcohol content when he was treated at the hospital for the stabbing, which was tested at .297, more than three and one-half times the limit

presumed to establish impairment to drive. RP 229, 231. The defense argued that the measurement was relevant to establish whether Flory remembered the events accurately and was inconsistent with his trial testimony that he had consumed only four beers. RP 231-32. The trial court granted the State's motion and prohibited the defense from soliciting the blood alcohol content measurement from Flory's treating physician, as well as talking about extreme intoxication. RP 232-33, 234. Consequently, the doctor testified only that Flory's lab work came back positive for alcohol. RP 246-47.

Staggs testified on his own behalf and denied that he knew Stickney at all, stating that the first time he ever saw Stickney was during his testimony at trial. RP 252-53. He denied trying to rob Flory and testified that he had been stabbed in 2009 and consequently developed a palsy on the left side of his face. RP 254-55. He denied that he ever carried a knife. RP 256. On cross-examination, he elaborated further that he had gone to culinary school as a chef but cannot go back to work due to his inability to be around knives. RP 262-63. Over defense objection, the trial court allowed the State to impeach Staggs with a meme he had posted on Facebook showing the Joker character from a Batman movie holding a knife and saying, "If you know I'm crazy, why you keep fucking with me?" RP 264-68; Exhibit 32. Staggs responded that he was a fan of

Heath Ledger and Batman, and “it’s just a post.” RP 270. Despite its emphasis on Staggs’s Facebook postings, the State never established any relationship between Staggs and Stickney on that medium or any other.

The jury convicted Staggs and returned a special verdict finding that he had used a deadly weapon in committing the crime. RP 335; CP 55-56. The sentencing court followed the State’s recommendation and imposed a statutory maximum sentence of 108 months for the base crime and 12 months for the deadly weapon enhancement. RP 355, CP 75. Staggs now timely appeals. CP 93.

V. ARGUMENT

Staggs asserted a case of mistaken identity but was prevented from presenting facts to the jury that would show Flory’s identification of him was suspect. Because the evidence of Flory’s blood alcohol content the night he was treated for the stabbing was relevant to his ability to accurately perceive and recall the incident and to impeach his claim that he had only had a few beers – suggesting his perception was unimpaired – the trial court erred in excluding it.

Both the Washington and the U.S. Constitutions guarantee criminal defendants the right to confront and cross-examine adverse witnesses. *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). Defense

counsel must be “permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.” *Davis v. Alaska*, 415 U.S. 308, 318, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

Because the right of cross-examination is constitutionally guaranteed, defendants enjoy wide latitude to cross-examine and impeach state witnesses. *State v. Wilder*, 4 Wn. App. 850, 854, 486 P.2d 319, review denied, 79 Wn.2d 1008 (1971) (“It is fundamental that a defendant charged with the commission of a crime should be given great latitude in the cross-examination of prosecuting witnesses to show motive or credibility.”). When evidence is central to establishing a valid defense, the balance should be struck in favor of admitting the evidence. *State v. Young*, 48 Wn. App. 406, 413, 739 P.2d 1170 (1987).

Furthermore, a criminal defendant has a fundamental constitutional right to call witnesses in her defense. The right to compel witnesses is guaranteed by the Sixth Amendment and article I, section 22 of the Washington Constitution. *Taylor v. Illinois*, 484 U.S. 400, 409, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988); *State v. Smith*, 101 Wn.2d 36, 41, 677 P.2d 100 (1984). The constitutional right to compel a witness's presence in the courtroom embraces the right to have the witness's testimony heard by the

trier of fact; thus, the right to offer testimony is "grounded in the Sixth Amendment even though it is not expressly described in so many words." *Taylor*, 484 U.S. at 409.

In addition, the right to call witnesses in one's own behalf has long been recognized as essential to due process. *Chambers v. Mississippi*, 410 U.S. 284, 294, 90 S. Ct. 1038, 35 L. Ed. 2d 297(1973); *Smith*, 101 Wn.2d at 41. In *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967), the United States Supreme Court explained that a defendant's right to present witnesses is essential to the right to present a defense:

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Thus, courts must jealously guard a criminal defendant's right to present witnesses in his defense. *Smith*, 101 Wn.2d at 41.

A criminal defendant's right to present witnesses is "an essential attribute of the adversary system itself" and therefore necessary to the truth-finding function of the trial:

The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Taylor, 484 U.S. at 408-09. Thus, a court order that excludes the testimony of a material defense witness may not only offend the defendant's fundamental constitutional right to offer testimony in his favor, but may also undermine the integrity of the adversarial process. *Id.* at 409, 414.

Here, by excluding evidence of Flory's blood alcohol content, the trial court precluded Staggs from effectively confronting him on the issue of his reliability as a witness due to the potential for alcohol to have affected his capacity to accurately perceive and recall his attacker. If the evidence was relevant, then the State must demonstrate a compelling state interest to justify its exclusion. *State v. McDaniel*, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996), *review denied*, 131 Wn.2d 1011 (1997). The threshold to admit relevant evidence is low. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). When evidence is of at least minimal relevance, the State has the burden to show "the evidence is so prejudicial

as to disrupt the fairness of the fact-finding process at trial,” and the State’s interest must be balanced against the defendant’s need for the information sought. *Id.* at 622.

In excluding the evidence of Flory’s blood alcohol content, the trial court found it was prejudicial because Flory had not denied drinking and because the doctor would not testify that it appeared to affect his ability to answer questions or remember what happened. RP 232-33. This ruling overlooked the defense argument that the measurement was not consistent with Flory’s report of consuming four to six beers, as well as the doctor’s observation that “alcoholics often come off like they’re perfectly fine,” and that Flory’s alcohol consumption could explain why his description changed over time. RP 232-33.

In the context of the trial, excluding the evidence undermined the fact-finding function of the trial by preventing the defense from challenging Flory’s testimony that he had only had a small amount to drink and was, therefore, perfectly capable of perceiving and recalling what happened. The blood alcohol content measurement suggested strongly that Flory minimized his alcohol consumption and that minimization, left unchallenged, implied to the jury that his identification was reliable. The unchallenged testimony also suggested that the jury

could evaluate Flory's reliability based on common personal experience of consuming four to six beers over the course of an evening, when the amount of alcohol actually consumed approaches lethally toxic limits for a casual drinker.

Challenging Flory's identification was critical to Staggs's defense of mistaken identity. Although Stickney also identified Staggs as the robber, his own involvement gave him a motive to shift blame and potentially accuse another falsely; accordingly, the trial court instructed the jury to regard his testimony with "great caution" and to carefully examine it in light of other evidence in the case – such as Flory's identification. CP 49. Indeed, the State never presented any independent evidence that Stickney and Staggs were even acquainted or that Staggs was in fact Stickney's cousin, as Stickney claimed. Flory's independent identification of Staggs after Stickney said he was the perpetrator served to corroborate Stickney's account. But had the jury known that Flory was far more intoxicated than he let on, it may well have regarded Flory's identification as the product of suggestion rather than strong independent corroboration.

Because the omission of the blood alcohol measurement misled the jury about Flory's reliability as a reporter and impaired Stickney's ability

to argue his mistaken identity defense, the trial court abused its discretion in excluding the evidence. *See State v. Lee*, 188 Wn.2d 473, 496, 396 P.3d 316 (2017). The error was not harmless because the evidence would have affected the jury's evaluation of Flory's identification and the circumstances leading to it, calling Staggs' identity as the perpetrator into question. Accordingly, a new trial should be granted.

VI. CONCLUSION

For the foregoing reasons, Staggs respectfully requests that the court REVERSE his conviction for attempted robbery and REMAND the case for a new trial.

RESPECTFULLY SUBMITTED this 16 day of September,
2019.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Brief upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Jason R. Weiskop, DOC #310189
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And, pursuant to prior agreement of the parties, by e-mail through the Court of Appeals electronic filing portal to the following:

Larry Steinmetz
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and sworn this 16 day of September, 2019 in Kennewick, Washington.



Andrea Burkhart

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