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Division III
State of Washington
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No. 36708-8-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Todd Bush,

Appellant.

Spokane County Superior Court Cause No. 16-1-01721-6

The Honorable Judge Raymond F. Clary

Appellant's Reply Brief

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ARGUMENT

I. MR. BUSH WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO CONFRONT ADVERSE WITNESSES.

The trial court should have allowed Mr. Bush to cross-examine Ty Hardin about his bias and motive for testifying. Outside the presence of the jury, Hardin acknowledged his hope for lenience on pending charges because of his cooperation in Mr. Bush's case. RP 142-143. He'd already received an unusually favorable deal after giving preliminary testimony against Mr. Bush. RP 88-89, 132, 136-137, 141-142, 145-146.

The trial court's restriction on cross-examination violated Mr. Bush's confrontation right. *United States v. Alexius*, 76 F.3d 642, 644-645 (5th Cir. 1996). This is so even in the absence of an explicit agreement. *Id.*; *United States v. Lankford*, 955 F.2d 1545, 1549 (11th Cir. 1992).

An accused person "is entitled to show by cross-examination that the testimony of a witness may be affected by fear or favor growing out of the disposition of pending criminal matters."¹ *United States v. Brown*, 546 F.2d 166, 169 (5th Cir. 1977); *see also Jones v. Gibson*, 206 F.3d 946, 956 (10th Cir. 2000); *Lankford*, 955 F.2d at 1549.

¹ In fact, the rule applies to possible charges, not merely charges that are already pending. *United States v. Sarracino*, 340 F.3d 1148, 1167 (10th Cir. 2003).

In *Alexius*, the court restricted cross-examination about a prosecution witness's arrests and pending charges.² *Alexius*, at 76 F.3d 644-645. The witness "had received no promises for his willingness to testify and... did not know if his decision to testify would aid him in his pending charges." *Id.*, at 645.

Nonetheless, the *Alexius* court found a confrontation violation. *Id.* The court noted that the witness "was in a 'vulnerable status' with respect to the government." *Id.* at 645 (quoting *Davis v. Alaska*, 415 U.S. 308, 317, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)).

Here, as in *Alexius*, Hardin "was in a 'vulnerable status' with respect to the government" because of his pending charges. *Id.* This gave him a motive to slant his testimony in the prosecution's favor. *Id.* Mr. Bush should have been allowed to explore Hardin's bias and motive for testifying. *Id.*

Respondent erroneously argues that Hardin's testimony "did not support Mr. Bush's claim." Brief of Respondent, p. 21. But Mr. Bush's argument is premised on the existence of pending charges, which placed Hardin "in a 'vulnerable status' with respect to the government." *Id.* The existence of these pending charges was undisputed.

² The witness's legal troubles were unrelated to the charges faced by the defendant. *Id.*

Respondent also devotes several pages to an effort to distinguish *United States v. Martin*, 618 F.3d 705, 727 (7th Cir. 2010), as amended (Sept. 1, 2010). Brief of Respondent, pp. 21-23. But *Martin* is only one of many cases finding a confrontation violation when the trial court refuses to allow inquiry into a witness's pending charges. See, e.g., *Alexius*, 76 F.3d at 644-645; *Lankford*, 955 F.2d at 1549; *Sarracino*, 340 F.3d at 1167; *Brown*, 546 F.2d at 169; *Jones*, 206 F.3d at 956. Respondent's efforts to distinguish *Martin* do not undermine the rule outlined in these authorities.

The court violated Mr. Bush's constitutional right to confront adverse witnesses. *Id.* Mr. Bush's convictions must be reversed. *Id.*

II. DETECTIVE SCHRIER SHOULD NOT HAVE SPECULATED IN FRONT OF THE JURY THAT MR. BUSH WAS INVOLVED IN DEALING METHAMPHETAMINE.

Detective Schrier testified that scales such as those found in Mr. Bush's SUV are often "part of a drug distribution." RP 280. This violated Mr. Bush's right to a fair trial. *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010).

The violation was serious: it implied that Mr. Bush was involved in drug dealing. There were no permissible inferences to be drawn from the evidence. See *McKinney v. Rees*, 993 F.2d 1378, 1384 (9th Cir. 1993). Accordingly, the introduction of the evidence violated due process. *Id.*

Respondent makes no effort to address Mr. Bush's due process argument. Brief of Respondent, pp. 24-33. This failure may be treated as a concession. *See In re Pullman*, 167 Wn.2d 205, 212 n. 4, 218 P.3d 913 (2009); *State v. McNeair*, 88 Wn.App. 331, 340, 944 P.2d 1099 (1997).

Instead, Respondent addresses only Mr. Bush's ER 404(b) argument, claiming that any objection was waived. Brief of Respondent, p. 32. But Respondent concedes that Mr. Bush argued both relevance and prejudice. Brief of Respondent, p. 32. The Supreme Court has held that "[a]n objection based on 'prejudice,' is adequate to preserve an appeal, based on ER 404(b)." *State v. Mason*, 160 Wn.2d 910, 933, 162 P.3d 396 (2007). The evidentiary error is preserved.³

The improper evidence was not cumulative. *See Gamble*, 168 Wn.2d at 177. Respondent does not argue otherwise. Brief of Respondent, pp. 24-33. This failure may be treated as a concession. *Pullman*, 167 Wn.2d at 212 n. 4; *McNeair*, 88 Wn.App. at 340.

The court's curative instruction likely did "more harm than good." *State v. Curtis*, 110 Wn. App. 6, 15, 37 P.3d 1274 (2002). Before excusing the jury, the court conducted a sidebar to hear argument. RP 280-282. The court then excused the jury, heard additional argument, crafted the

³ The constitutional argument may be raised for the first time on appeal, under ER 2.5(a)(3); *see State v. O'Hara*, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). Respondent does not suggest otherwise.

instruction, and recessed twice before reading the instruction to the jury.
RP 282-301.

This gave jurors a great deal of time to picture Mr. Bush as a drug dealer before they even heard the court's instruction. This negative image had the potential to operate at a subconscious level, and "may not [have been] curable with a limiting instruction." *In re Glasmann*, 175 Wn.2d 696, 710 n. 4, 286 P.3d 673, 680 (2012) (internal quotation marks and citation omitted).

For all these reasons, the trial court should have granted Mr. Bush's motion for a mistrial. *Gamble*, 168 Wn.2d at 177. The convictions must be reversed, and the case remanded for a new trial. *Id.*

CONCLUSION

The trial court infringed Mr. Bush's Sixth Amendment right to confront witnesses by restricting cross-examination of Hardin. Because of his pending charges, Hardin "was in a 'vulnerable status' with respect to the government." *Alexius*, 76 F.3d at 645 (quoting *Davis*, 415 U.S. at 317). The court should have allowed Mr. Bush to explore Hardin's bias and motive to testify. *Id.*

Mr. Bush's constitutional right to a fair trial was violated by the introduction of testimony suggesting that he was a drug dealer. There were

no permissible inferences to be drawn from the evidence. Its admission violated due process, ER 403, and ER 404(b).

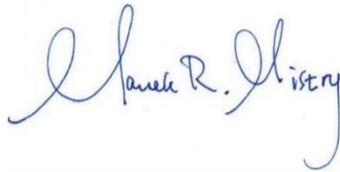
The convictions must be reversed, and the case remanded for a new trial.

Respectfully submitted on December 11, 2019,

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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:

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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 December 11, 2019.



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