

FILED
Court of Appeals
Division III
State of Washington
9/23/2019 8:00 AM

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 Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The court violated Mr. Bush's confrontation right under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §22.
2. The court erred by prohibiting cross-examination into matters affecting Hardin's bias and motivation to testify.
3. The court erred by refusing to allow cross-examination into Hardin's well-founded belief that he might receive some benefit from cooperating with the State.

ISSUE 1: An accused person has a constitutional right to confront adverse witnesses. Did the court violate Mr. Bush's confrontation right by limiting his cross-examination into Hardin's bias and motive for testifying?

4. Mr. Bush's conviction was based in part on propensity evidence, in violation of his Fourteenth Amendment right to due process.
5. The prosecutor improperly introduced irrelevant evidence suggesting that Mr. Bush was involved in dealing methamphetamine.
6. The trial court erred by denying Mr. Bush's motion for a mistrial.
7. The timing of the trial court's curative instruction had the effect of emphasizing the improper propensity evidence.

ISSUE 2: A criminal conviction may not be based on propensity evidence. Did Mr. Bush's conviction violate his Fourteenth Amendment right to due process because it was based in part on propensity evidence?

ISSUE 3: A mistrial must be granted whenever an accused person has been so prejudiced that fairness cannot be ensured absent a new trial. Should the trial judge have granted Mr. Bush's motion for a mistrial after the prosecutor improperly elicited testimony suggesting that Mr. Bush is a methamphetamine dealer?

ISSUE 4: A curative instruction cannot be effective when jurors are exposed to inherently prejudicial material that is likely to impress itself upon their minds. Was the court's curative instruction inadequate to cure the prejudice resulting from the prosecutor's improper suggest that Mr. Bush is a methamphetamine dealer?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Todd Bush and his girlfriend, Summer Patrick, were driving in Spokane around midnight in May of 2016. RP 157, 652. They were arguing; Ms. Patrick was using methamphetamine, which was in part what they were arguing about. RP 563, 653. This was the not the first argument the couple had over her substance use, and it was not the first time she'd become erratic and physically aggressive in a vehicle. RP 563-565, 653-659.

The SUV swerved to the right, striking a cyclist and knocking him over the bridge. RP 162, 213, 216. Richard Johnson, who had been on the bike, died. RP 227, 477-495. He was later found to have alcohol and THC in his system, as well as alcohol and marijuana in his pack. RP 117-118; CP 187-190. Police arrested Mr. Bush, and the State charged him with vehicular homicide. CP 1-3.

At trial, Ty Hardin testified. RP 156-173. He said that he saw the swerve, impact the man, and then followed the SUV to where it stopped. RP 162-167. He said that Mr. Bush was driving the SUV. RP 167.

Mr. Hardin had criminal matters pending after Mr. Bush had been charged. In fact, he had been arrested on two new felonies, which were rendered more serious by his record of at least nine prior felony convictions. CP 89. He acknowledged that he was hoping the State would

be lenient in response to his cooperation and testimony. RP 130-138. He said that he had not received any consideration or promises from the State, but when he did eventually resolve the case, the more serious felony was dismissed, and he was “erroneously” sentenced with only 2 points. CP 88-89; RP 132, 145.

Even so, the court excluded cross examination on the subject.¹ RP 130-150; CP 87-100. Hardin was the only State’s witness to tell the jury that Mr. Bush was driving. RP 156-173.

At first, Mr. Bush told police that the woman he was with was driving.² RP 206, 335, 561. When interviewed later, he said that he was driving and Patrick had grabbed the wheel. RP 561. Between that time and the time of trial, the two married. RP 650-651. The prosecutor sought to call now Mrs. Bush as a witness, but she invoked her right to remain silent and spousal privilege. RP 709-714.

Detective Schrier testified about his search of the SUV. RP 257-280. He told the jury he found methamphetamine residue in a baggie, a pipe and a scale. RP 264-276. The prosecutor asked him what significance he attached to those items. The detective responded these

¹ In fact, Mr. Hardin initially avoided cooperation in the matter, to the extent that the State obtained a material witness warrant and conducted a preservation deposition, anticipating he would not make himself available for testimony at trial. CP 74-82; RP 93-114.

² Mr. Bush initially claimed it was a woman he’d just met, he later gave his girlfriend’s name. RP 335, 561.

items when located in the past “are a lot of times part of a drug distribution.” RP 280.

The defense objected. Mr. Bush’s attorney told the trial judge that such an unsupported smear of Mr. Bush could not be corrected. RP 280-285. He explained to the court that part of the defense was to weaken the State’s theory that Mr. Bush was a drug user, which was now impossible in the face of the allusion to drug dealing. RP 280-285. The court struck the evidence but denied the defense motion for a mistrial. RP 280-301. The court brought the jury back in and gave a curative instruction. RP 297-301.

The jury convicted Mr. Bush as charged. CP 217-219. After sentencing, Mr. Bush timely appealed. CP 278-291.

ARGUMENT

I. THE COURT VIOLATED MR. BUSH’S CONFRONTATION RIGHT BY IMPROPERLY RESTRICTING CROSS-EXAMINATION OF HARDIN.

Ty Hardin received an extraordinarily favorable plea bargain after providing testimony against Mr. Bush at a pretrial hearing. When he was summoned to testify at Mr. Bush’s trial, he was in custody on new felony charges. He acknowledged his hope that he might receive lenient treatment in return for his cooperation with the State.

The trial court improperly refused to allow cross-examination into Hardin’s subjective belief that he might receive favorable treatment if he testified against Mr. Bush. This violated Mr. Bush’s constitutional right to confront the witnesses against him.

A. Mr. Bush had a constitutional right to confront adverse witnesses.

The federal and state constitutions both guarantee the right to confront adverse witnesses. *State v. Darden*, 145 Wn.2d 612, 620, 26 P.3d 308 (2002) (citing *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)); U.S. Const. Amend. VI; Wash. Const. art. I, §22.

The confrontation right guarantees an opportunity to conduct “meaningful cross-examination of adverse witnesses.” *Darden*, 145 Wn.2d at 620. Cross-examination that is even minimally relevant must be permitted. *Id.*, at 621. Evidence may not be excluded unless it is “so prejudicial as to disrupt the fairness of the fact-finding process.”³ *Id.*

The exposure of a witness’s bias or incentive for testifying is a core value protected by the confrontation right. *United States v. Martin*, 618 F.3d 705, 727 (7th Cir. 2010), *as amended* (Sept. 1, 2010).

³ Even if the State establishes such extreme prejudice, the evidence must nonetheless be admitted unless the State’s interest outweighs the defendant’s need for the evidence. *Id.*

B. The court should have allowed Mr. Bush to elicit Hardin's belief that he might benefit from cooperating with the prosecution.

While Mr. Bush's case was pending, Hardin was arrested for two felony charges, one of which was a Class B felony. CP 89. He had nine prior felony convictions. CP 88-89. With these charges yet to be resolved, the parties "did preservation testimony of Mr. Hardin."⁴ RP 132. His testimony incriminated Mr. Bush. RP 93-111.

Mr. Hardin was subsequently permitted to plead guilty to only one felony charge; the Class B felony was dismissed. RP 141-142, 145-146. This was unusual; the Spokane County Prosecutor's office ordinarily requires offenders with nine or more points to plead guilty as charged. RP 136-137, 145.

Because of a "miscalculation" of his offender score, the prosecution acknowledged that Hardin's sentence "was much lower than perhaps it should have been." RP 132. In fact, Hardin was sentenced with an offender score of two, rather than nine. RP 145.

Hardin was in custody on a new set of charges when he was summoned to testify at Mr. Bush's trial. RP 132. The prosecutor told Hardin's attorney that "on the new case he would be scored appropriately and is looking at a much heftier penalty." RP 133.

⁴ The prosecution feared that Mr. Hardin might not appear to testify against Mr. Bush and obtained a material witness warrant. CP 75-76; RP 84-92, 132.

Outside the presence of the jury, Hardin was asked if it had “cross[ed] [his] mind that perhaps [he] would receive some sort of leniency or mercy by the prosecutor because [he was] being cooperative in coming to court on the Todd Bush case.” RP 142.

He denied any explicit agreement but explained that “[a]s a criminal, we, of course, would wish something to be like that...”⁵ RP 142. He went on to say “[i]t’s hope on every charge, you know.” RP 143.

Defense counsel wanted to cross examine Hardin about his “subjective beliefs,” given the lenience he received when he pled guilty to the earlier charges. RP 135. As counsel explained:

[H]e said that he had this hope, this subjective hope... And I think it colors his—it goes to bias when he has this hope.
RP 147.

Defense counsel proposed asking Hardin if he were “hoping that [his] cooperation on this case would have or would now get [him] a better deal.” RP 147.

The prosecutor argued that the inquiry was improper “unless there is a cooperation agreement that makes that relevant.” RP 148. The court agreed and refused to allow cross-examination into Hardin’s subjective hope, absent a formal cooperation agreement. RP 149-150. The judge

⁵ According to Hardin, “it didn’t happen” on the prior charges because there was no explicit agreement. RP 142. He explained that “[m]y deal was that my points have dropped and cleared away...” RP 143.

explained his ruling as follows: “[J]ust because he hopes that he might get favorable treatment in sentencing doesn’t demonstrate bias where he didn’t ask for an agreement and one was never offered.” RP 150.

Mr. Bush should have been allowed to inquire into Hardin’s subjective hope for lenience. *Martin*, 618 F.3d at 728-730. The court’s refusal to allow cross-examination violated Mr. Bush’s confrontation right. *Darden*, 145 Wn.2d at 620.

Proof of bias is almost always relevant. *United States v. Abel*, 469 U.S. 45, 52, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984) . An accused person must be allowed to cross-examine a witness regarding any expectation that his/her testimony might affect the resolution of other charges. *Martin*, 618 F.3d at 727.

A witness with such expectations may have “a desire to curry favorable treatment.” *Martin*, 618 F.3d at 727. The exposure of such a motivation for testifying “is a proper and important function of the constitutionally protected right of cross examination.” *Davis*, 415 U.S. at 316-17.

This is particularly true when the timing, nature, and status of the witness’s charges permit an inference by which the jury could conclude that the witness is biased. *Martin*, 618 F.3d at 730. The absence of an explicit agreement “does not end the matter.” *Martin*, 618 F.3d at 728.

Indeed, the witness need not even be aware of her or his own bias; the exposure of a witness's unconscious bias is a proper object of cross-examination. *See Abel*, 469 U.S. at 52.

In *Martin*, for example, a witness gave a statement to police at a time when “he *might* have been charged with murder.” *Martin*, 618 F.3d at 728 (emphasis in original). The court concluded that the mere possibility of charges “could have been linked to [his] decision to cooperate with the Government.” *Id.* The court found a confrontation violation based on the court's restriction of cross-examination into the witness's potential bias. *Id.*, at 730.

This case presents an even stronger inference of bias than that raised in *Martin*. Hardin received an extraordinary plea bargain after providing “preservation testimony.” RP 132, 136-137, 141-142, 145-146. He was in custody on new charges at the time he was called to testify in Mr. Bush's case, and he'd been warned that he was “looking at a much heftier penalty.” RP 133. He acknowledged his subjective hope that cooperating could lead to a more favorable outcome. RP 142-143.

This sequence of events strongly supports Hardin's subjective hope that providing incriminating testimony would prove beneficial. Cross examination should not have been restricted. *Id.*

Instead of allowing Mr. Bush to explore Hardin's bias and motivation for testifying, the court improperly excluded the evidence. Defense counsel was not permitted to explore Hardin's plea deal on the prior charges. Nor was he allowed to cross examine Hardin regarding the pending charges and his subjective hope that he might receive a more favorable outcome in return for his cooperation.

The court violated Mr. Bush's constitutional right to confront adverse witnesses. *Darden*, 145 Wn.2d at 620. Mr. Bush's convictions must be reversed. *Id.*

II. THE PROSECUTOR VIOLATED MR. BUSH'S RIGHT TO DUE PROCESS BY SUGGESTING THAT HE IS A METHAMPHETAMINE DEALER.

During direct examination, the prosecutor asked Detective Schrier about the "significance" of a scale found in the SUV. RP 280. The detective told jurors that similar scales are "a lot of times part of a drug distribution." RP 280. The trial court refused to grant Mr. Bush's motion for a mistrial. This error violated Mr. Bush's due process right to a fair trial.

The use of propensity evidence to prove a crime violates due process.⁶ U.S. Const. Amend. XIV; *McKinney v. Rees*, 993 F.2d 1378 (9th

⁶ The U.S. Supreme Court has expressly reserved ruling on a similar issue. *Estelle v. McGuire*, 502 U.S. 62, 75 n. 5, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

Cir. 1993). A due process violation occurs if there are no permissible inferences to be drawn from the evidence. *Id.*, at 1384.

The rules of evidence also prohibit the introduction of propensity evidence: “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” ER 404(b); *see, e.g., State v. Slocum*, 183 Wn. App. 438, 457, 333 P.3d 541, 551 (2014); *State v. Fuller*, 169 Wn. App. 797, 831, 282 P.3d 126 (2012); *State v. Briejer*, 172 Wn. App. 209, 227, 289 P.3d 698 (2012).

Here, the prosecutor improperly elicited testimony suggesting that Mr. Bush was involved in drug distribution. RP 280. There were no permissible inferences that could be drawn from the evidence. *McKinney*, 993 F.2d at 1384.

The evidence was not relevant to either charged crime. Instead, it suggested to jurors that Mr. Bush was a bad actor, deeply involved in reprehensible criminal behavior.

Defense counsel was forced to immediately object and request a mistrial. RP 280. This emphasized the importance of the evidence, and undoubtedly impacted jurors’ perceptions of Mr. Bush.

Believing Mr. Bush participated in dealing methamphetamine, some jurors may have voted to convict simply to remove him from the

street regardless of the strength of the evidence. Others may have believed he was more likely guilty of the charged crime because of his propensity toward criminality. Still others may have discounted his testimony, assuming he was less credible because he was a drug dealer.

Nor was the problem ameliorated by the court's instruction to strike the testimony. The Supreme Court has noted that curative instructions "cannot logically be said to remove the prejudicial impression created where the evidence admitted into the trial is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors." *State v. Mack*, 80 Wn.2d 19, 24, 490 P.2d 1303 (1971); *see also State v. Miles*, 73 Wn.2d 67, 70, 436 P.2d 198 (1968) (rather than curing prejudice, an instruction may "emphasize the testimony in the minds of the jury.")

Furthermore, some evidence creates bias or prejudice that operates subconsciously. Such prejudice "may not be 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). Evidence that a person is engaged in dealing methamphetamine has the potential to create such unconscious bias.

A mistrial should be granted "when the defendant has been so prejudiced that nothing short of a new trial can insure [sic] that the

defendant will be tried fairly.” *State v. Gamble*, 168 Wn.2d 161, 177, 225 P.3d 973 (2010). A ruling denying the accused person’s request for a mistrial must be overturned “when there is a substantial likelihood that the prejudice affected the verdict.” *Id.*

Factors to be considered when assessing prejudice include the seriousness of the violation, whether it involved cumulative evidence, and whether the trial court properly instructed jurors to disregard it. *Id.* Here, the introduction of propensity evidence requires reversal of Mr. Bush’s convictions. *Id.*

First, the violation was serious. By suggesting that Mr. Bush was involved in drug dealing, the prosecutor unfairly cast him in a negative light. As noted, jurors may have decided to convict Mr. Bush or to disbelieve his testimony based on their impression that he was a bad person involved in dealing methamphetamine.

The evidence was not cumulative. Nothing in the record suggested that Mr. Bush was connected to drug distribution. He was charged with simple possession, not possession with intent to deliver.

The court’s instruction to disregard the evidence did not cure the problem. Curative instructions “frequently [do] more harm than good.” *State v. Curtis*, 110 Wn. App. 6, 15, 37 P.3d 1274 (2002). Such is the case here.

Following defense counsel's objection, jurors remained in the courtroom during a sidebar. RP 280-282. While the judge listened to argument and crafted his instruction, jurors had time to consider the testimony they had just heard. RP 280-282. Each juror had the opportunity to picture Mr. Bush as a drug dealer, involved in the criminal underworld, and to form a negative impression that would linger in the subconscious.

The court's instruction to disregard the evidence came too late. The negative impact had already occurred. The court's instruction only served to emphasize the evidence.

Although jurors are presumed to follow curative instructions, "no instruction can 'remove the prejudicial impression created [by evidence that] is inherently prejudicial and of such a nature as to likely impress itself upon the minds of the jurors.'" *State v. Escalona*, 49 Wn. App. 251, 255, 742 P.2d 190 (1987) (quoting *Miles*, 73 Wn.2d at 71). This Court cannot be "assured that the evidentiary harpoon here inserted could effectively be withdrawn" by the court's instruction to disregard the detective's testimony. *State v. Suleski*, 67 Wn.2d 45, 51, 406 P.2d 613 (1965).

The prosecutor violated Mr. Bush's right to due process by suggesting he is a methamphetamine dealer. The evidence was inadmissible under ER 403 and ER 404(b). There were no permissible

inferences that could be drawn from it. *McKinney*, 993 F.2d at 1384. The convictions must be reversed, and the case remanded for a new trial. *Id.*

CONCLUSION

Mr. Bush's trial was fundamentally unfair. He was not permitted to cross examine Ty Hardin regarding his bias and motive for testifying. Hardin had a reasonable expectation of receiving a substantial benefit in return for his cooperation with the government. The trial court violated Mr. Bush's constitutional right to confront adverse witnesses by refusing to allow cross examination in this area.

In addition, the prosecutor improperly suggested that Mr. Bush is involved in dealing methamphetamine. There were no permissible inferences to be drawn from this propensity evidence. It was inherently prejudicial and likely to "impress itself upon the minds of the jurors." *Mack*, 80 Wn.2d at 24. By injecting this evidence into the proceedings, the prosecutor infringed Mr. Bush's due process right to a fair trial.

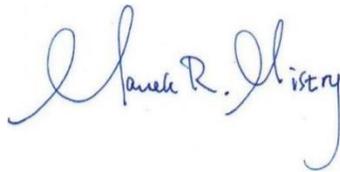
The convictions must be reversed, and the case remanded for a new trial.

Respectfully submitted on September 23, 2019,

BACKLUND AND MISTRY

A handwritten signature in blue ink that reads "Jodi R. Backlund". The signature is written in a cursive style with a large initial "J".

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CERTIFICATE OF SERVICE

I certify that on today's date:

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I filed the Appellant's Opening 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 September 23, 2019.



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September 23, 2019 - 3:57 AM

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