

ORIGINAL

NO. 64056-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM HARRIS,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL FOX

BRIEF OF RESPONDENT

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I. ISSUE PRESENTED

Did the trial court abuse its discretion by admitting evidence of the defendant's prior conviction for murder when the defendant opened the door to that evidence by testifying on direct examination that he was being truthful and that he could not remember that he had a brother, when the defendant had in fact, for years, maintained that he had been wrongly convicted of murder and that his brother was the real killer?

II. STATEMENT OF THE CASE

The State charged Harris by information with one count of Communicating with a Minor for Immoral Purposes for attempting to solicit 12 year old Robbie Haislip to have oral sex with him. CP1; 5RP 70, 84. A jury trial ensued.¹

Robbie Haislip, his parents and an older brother were visiting Seattle from Missouri. 5RP 71-73.² The family was staying at a

¹ At the time of the offense, Harris had recently been released from the Department of Corrections where he was serving a sentence after being convicted of murder. 6RP 120. Harris had spent approximately 35 years in prison. 6RP 120. He blamed his brother for the murder. 6RP 120.

² This brief cites the seven volumes of the verbatim report of the proceedings in this case as follows: 1RP: December 16, 2008 (competency return hearing); 2RP: July 7, 2009 (pre trial motions); 3RP: July 8, 2009 (pre trial motions); 4RP: July 9, 2009 (trial); 5RP: July 13, 2009 (trial); 6RP: July 14, 2009 (trial); 7RP: August 24, 2009 (sentencing).

motel on Aurora Avenue called the Night's Inn during the last week of July, 2008. 4RP 28-29, 43. Harris was also staying at the motel. 4RP 42.

Robbie and his brother were staying in an adjoining room to the parents. 5RP 75. Robbie, a 7th grader, would walk out onto the upper floor balcony of the motel at around 1:30 in the morning. 5RP 77, 79.

At one point during the family's stay at their motel, Robbie saw Harris walking around the motel complex and actually saw the defendant come upstairs to the level where Robbie's room was. 5RP 80. No one else was out that early in the morning. 5RP 84. Robbie found a note left on the balcony outside his room. It said "\$100 for a blow job and meet me downstairs in 10 minutes." 5RP 85.

Later the next day, Robbie saw Harris walk outside his motel room again. 5RP 87, 89. Robbie went outside and found another note. 5RP 89. The note was secured with a coin. 5RP 89-90. Robbie opened the second note. It read "a \$100 if you want a blow job downstairs." 5RP 57. Robbie positively identified Harris in court as the man who left the notes. 5RP 81.

Robbie told his parents about the notes. 5RP 88. His parents contacted the motel's manager. 4RP 35. As Robbie and his parents were in the manager's office, Harris walked by, and Robbie identified him by saying "that's him." 4RP 36, 43. The manager observed Harris peek out of his curtains when the police arrived. 4RP 38. Harris then made a straight line from his room to his car. 4RP 45. The manager informed the police officer that the defendant was leaving the scene. 4RP 45.

Seattle Police Officer George Baseley had responded to the Knights Inn motel to investigate a complaint by the family that someone had left notes soliciting sex from Robbie. 4RP 55. As Officer Baseley was talking to the family, Harris started to leave the motel. 4RP 58. Officer Baseley pursued Harris in his patrol car. 4RP 59-61.

Officer Baseley eventually stopped Harris and told him he was investigating him for passing notes to a 12 year old boy asking for sex. 4RP 64. Harris ran from his stopped car. 4RP 66-67. Baseley was eventually able to place Harris under arrest. 5RP 6. When he returned to the motel, Officer Baseley did a cursory search of Harris' room. He found a half eaten hamburger on the table and the window curtains ajar. 5RP 9.

Detective Chris Young with the Seattle Police Department interviewed Harris in the King County Jail some hours after his arrest. 5RP 136-37. Harris was articulate and eloquent during the interview. 5RP 136. He denied writing any notes to Robbie. 5RP 147. He made no indication to the detective that he was under the influence of alcohol. 5RP 155.

Harris testified at trial, just two weeks shy of a year since the incident. 5RP 173. He said on direct examination that he was writing the notes to men he did not know because he wanted to have sex with them. 5RP 200. He said, however, that he was scared of the men whom he solicited for sex. 5RP 200.

On direct examination, Harris detailed his activities in the days before the charged incident. 5RP 173. He recalled the name of the paint store he went to and where it was located; he recalled three jobs he was working; he recalled the manner in which cars were parked in the Knights Inn parking lot. 5RP 174-80. Harris remembered the time he arrived at the motel, the weather that day, the drapes in his motel room, the smell of the room and the type of whiskey he bought. 5RP 181-82. Harris remembered the time the sun set and the time he bought a hamburger. 5RP 183, 192.

Harris testified about where he parked his car, that he was hungry, that he smoked, and that he took Zantax. 5RP 195-96.

He described the route he took when he fled from the Knights Inn. 6RP 5-15. He described where he turned into the parking lot, the number of lanes he crossed, the block in which he turned, and driving the car horizontal to a bus lane. 6RP 8. He drew a detailed map of his route. 6RP 9. Harris recalled getting out of his car and giving the officer proof of his insurance and his driver's license. 6RP 10. He remembered standing for 30 seconds while the officer checked his license. 6RP 10.

His memory, however, failed him when it came to recalling the specifics of why the officer stopped him. 6RP 10-11. He said that he heard "something about children or notes or something to that effect." 6RP 10-11. Harris said he could not comprehend what was happening. He said it was a "Kafkaesque experience" and a "bomb going off" and that he was "just irrational" and that he panicked. 6RP 11-12. He nevertheless precisely described the route he took as he fled the police, detailing a Sylvan Learning Center, the contours of the parking lot, the location of buildings, and the types of businesses around him. 6RP 13.

Harris said he could not remember if he talked to Officer Baseley about the notes he had left. 6RP 15. He said he could not recall talking to the detective at the jail. 6RP 16. He said that on the day the detective interviewed him, the day after he fled the Knights Inn, that he did not remember writing two notes. 6RP 16.

A year later at trial, Harris admitted writing the two notes but claimed he did not write them to Robbie. 5RP 172-73. He explained the improvement in his memory as follows:

"Well, I have 235 days clean and sober today. I haven't been drinking or anything like that. I've had time to reflect on matters, and we've talked about how important it is to remember accurately as much as I can under the circumstances, and I've done my best to do that."

6RP 16-17.

Harris continued to discuss his memory while on direct examination. His lawyer inquired about the time that Harris had spent at Western State Hospital undergoing a competency exam.³ She queried Harris about whether he remembered talking to Dr. Danner while at Western State. 6RP 17. She asked him whether he told Dr. Danner in December 2008 that he did not remember the incident. 6RP 17. The defendant testified he

³ The defendant was found competent to stand trial. CP 13-14.

remembered telling Dr. Danner that he did not remember the incident. 6RP 17. His lawyer then asked:

- Q. Why did you tell Mr. Danner that you didn't remember the incident at all?
- A. I was under a legal warning that came as Miranda warning that anything I said could be used as evidence, and I was under no advisement from you, that I recall, as to how I should approach the situation. I had recently been on a horrific four month long binge where I was doing nothing but drinking. I had walked away from my whole life, and I was almost a basket case. **I couldn't even remember my own phone number or that I had a brother or where I lived.** Neither, had I talked to anyone that I'd known for four months. So I was in pretty bad shape.
- Q. When you told Mr. Danner that you didn't remember the incident at all was that the truth at the time or something that was convenient at the time?
- A. No, I didn't remember.

6RP 17 [emphasis added].

During pre-trial motions, the State had informed the Court that it would not seek to introduce any facts surrounding Harris' murder conviction. After the defendant testified to his truthfulness and his claimed failed memory, the prosecutor sought permission outside the presence of the jury to cross examine the defendant on his unsolicited statement that he did not remember he had a brother. 6RP 27. The prosecutor pointed out that it was fantastic

that the defendant, who had spent decades in prison blaming his brother for the murder of which Harris was convicted, would forget that he had a brother. 6RP 28-29.⁴

The court agreed:

Well, I think it is certainly highly prejudicial, but his testimony has now made it relevant. I wish this hadn't happened, but I think that he so testified on direct about his interview with a State employee whose name was Danner, who apparently is employed at Western State Hospital. And he did make reference to his brother, and he made reference that he didn't know where he lived. So now we are stuck with the situation. It certainly is highly prejudicial, but it's legitimate in this case because of credibility, and I will entertain a proposal for a limine instruction, but I don't know what good it's going to do, frankly.

6RP 29.

The Court later noted that Harris "...did testify that he didn't remember having a brother, and that testimony seems to me to be highly incredible given the background of what the State has represented as his shifting the blame to his brother in a murder for which he spent more than 20 years in prison." 6RP 65.

Counsel for Mr. Harris agreed that the defendant had opened the door to cross examination concerning Harris' brother:

⁴ The prosecutor informed the Court that he had Harris' community corrections officer ready to testify and that she was prepared to say that the defendant had maintained during his incarceration that the defendant blamed his brother for his murder conviction. 6RP 65.

"I also would put this to the Court, the defense does not disagree that Mr. Harris opened the door to evidence of prior convictions directly or indirectly, and he referred to prior residence and his brother." 6RP 63. Harris' counsel argued that there were alternative means to cross examine the defendant about his memory of his brother. 6RP 63.

On cross examination, and before the prosecutor addressed Harris' contention that his brother was responsible for the murder of which Harris was convicted, Harris continued to claim poor memory. He said he could not remember telling Det. Young that he had gone to the Knights Inn to have an overnight getaway with a boyfriend. 6RP 43. He said he did not remember the detective wanting to know where his boyfriend was. 6RP 46. He said he did not, at the time of the detective's interview, know the name of the apartment where his boyfriend lived. 6RP 49. He said he did not remember, at trial, that he had put a figure on how much he would pay for oral sex. 6RP 50. He said he did not remember telling Det. Young that he only admitted to writing one note. 6RP 57. He said that at the time he talked to Det. Young, he could not remember writing two notes. 6RP 58.

He conceded, however, that at the time he met with the detective that his mind was clear and his memory was fine.

6RP 75.

Harris made further concessions during cross. He admitted that he wrote the notes and that he was willing to pay to perform oral sex. 6RP 71-72. He admitted he told the detective something different while being interviewed in the jail, specifically that he "wanted to leave the notes to provoke a reaction." 6RP 73. He also conceded that he told the detective he could not remember what he had written on the notes. 6RP 85. He admitted that he chose to tell the detective he had only written one note, when in fact he knew he had written two. 6RP 91-92.

Harris continued to complain of memory loss during his time at Western State Hospital, months after the charged incident. 6RP 99. He admitted that he told the Western State doctor that he did not know whether he had been drinking when, in fact, he knew that he was drinking. 6RP 100. He admitted that his statements about drinking to the Western State employees were not true. 6RP 101.

At trial, Harris still said he did not remember other things while he was at Western State Hospital, such as his birth date.

6RP 104. He went back and forth between remembering and forgetting details of what happened while he was at Western.

6RP 106-07.

Harris maintained that while he was at Western, he could not remember where he lived or that he had a brother. 6RP 112-13.

The prosecutor queried Harris on his decades long belief that his brother was the person responsible for the murder of which Harris was convicted. Harris admitted that he spent about 25 years in prison for murder and that his brother was to blame. 6RP 120.

He then claimed that when he testified that while at Western State he had not forgotten he had a brother but that he simply had "blacked out." He then said he merely forgot his brother's name.

6RP 121.

III. ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING EVIDENCE OF THE DEFENDANT'S MURDER CONVICTION WHEN THE DEFENDANT TESTIFIED ON DIRECT EXAMINATION THAT HE COULD NOT REMEMBER HE HAD A BROTHER AND TOLD THE JURY HE WAS BEING TRUTHFUL IN HIS REPRESENTATIONS.

A defendant "opens the door" to otherwise inadmissible evidence when he brings up a subject to his advantage and then

relies on the Rules of Evidence to bar further inquiry into the matter by opposing counsel. "By voluntarily raising a subject on direct examination, a party may waive any objection to cross examination or rebuttal on that subject, even though the cross examination or rebuttal would otherwise be forbidden by the rules of evidence."

Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence at 192 (2008-2009 edition). In State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969), the Supreme Court explained what it means to "open the door":

It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it. Rules of evidence are designed to aid in establishing the truth. To close the door after receiving only a part of the evidence not only leaves the matter suspended in air at a point markedly advantageous to the party who opened the door, but might well limit the proof to half-truths. Thus, it is a sound general rule that, when a party opens up a subject of inquiry on direct or cross-examination, he contemplates that the rules will permit cross-examination or redirect examination, as the case may be, within the scope of the examination in which the subject matter was first introduced.

(citations omitted).

If a party opens the door to inadmissible evidence with his own questions, the opposing party may respond by asking additional questions about the same matter. State v. King,

58 Wn.2d 77, 78-79, 360 P.2d 757 (1961); see also State v. Jones, 26 Wn. App. 1, 8-9, 612 P.2d 404 (1980). This general rule likewise applies to evidence ruled inadmissible on constitutional grounds. State v. Kendrick, 47 Wn. App. 620, 631, 736 P.2d 1079 (1987) (State permitted to comment on defendant's post-arrest silence to impeach his version of his post-arrest conduct). The determination that a party has opened the door is reviewed for abuse of discretion. State v. Bennett, 42 Wn. App. 125, 127, 708 P.2d 1232 (1985).

In State v. Warren, 134 Wn. App. 44, 138 P.3d 1081 (2006), the defendant was charged with raping his step-daughters. He testified that he was not the type of person who would touch the sexual parts of a girl. Warren, 134 Wn. App. at 64. Despite the highly prejudicial nature of the evidence, the Court allowed the fact of Warren's prior conviction for child molestation for impeachment purposes. Warren, 134 Wn. App. at 64. In affirming the conviction, the Court of Appeals noted that the defendant opened the door to the testimony by his claim of good character. Warren, 134 Wn. App. at 64.

In State Kendrick, the defendant portrayed his cooperation with police as evidence of his innocence. Kendrick, 47 Wn. App.

620, 631, 736 P.2d 1079 (1987). The Court held that "in so doing, he "opened the door" to further inquiries about the subject." Kendrick, 47 Wn. App. at 631. See also State v. Collins, 45 Wn. App. 541, 726 P.2d 491 (1986) (defendant convicted of murdering his wife opened the door to his own suicide attempt at the time of the murders by referencing it in direct examination).

Other instances of "opening the door" to otherwise barred evidence include cross examining a witness with a goal of creating an impression not supported by the full facts. In State v. Hartzell, the defendant (acting as his own lawyer) cross examined a police officer about the victim's statement. His examination was designed to create an impression that the victim had claimed someone other than the defendant was the real shooter. State v. Hartzell, 153 Wn. App. 137, 154, 221 P.3d 928 (2009). The Court held that by conducting cross-examination in this way, the defendant opened the door to letting the detective testify to the victim's more complete statements, despite them otherwise being excluded as hearsay. Hartzell, 153 Wn. App. at 153-54.

Here, Harris had a mixed defense of failed memory and misinterpreted actions (his). He placed his credibility squarely at issue by offering that while he was at Western State Hospital, he

could not recall the charged incident, that he did not know he had a brother and that he did not know where he had lived. 6RP 17. In essence, he asked the jury to believe that while he was at Western State Hospital, he could not give doctors an accurate account of what happened in this case because of his poor memory. He highlighted the issue even further when his lawyer asked him if he was being truthful to the doctors at Western State Hospital and the defendant replied that he was -- that he could not remember. 6RP 17.

After the State applied to use the defendant's conviction for murder to impeach him on his claim he was being truthful when he said he did not remember he had a brother, Harris' counsel conceded that the door had been opened. 6RP 63. As Judge Fox remarked, it was "highly incredible" that the defendant would offer he did not remember having a brother given that he blamed his brother for spending decades in prison. 6RP 65.

Allowing that topic to go unaddressed would be markedly advantageous to Harris, the party who opened the door, but at the same time limiting the evidence to half-truths. Gefeller, 76 Wn.2d at 455. Harris' attempt to frame his prior statements to doctors and police as being the product of poor memory was at the heart of his

defense and at the heart of his attempt to appear sympathetic and reasonable to the jury.

The trial court did not abuse its discretion in allowing the prosecutor to confront Harris with the fantastic claim that he could not remember the brother whom he blamed for spending 25 years in prison, particularly when Harris made the point of claiming that he was being truthful in invoking memory loss. It was a subject entirely of his own choosing and, as Judge Fox noted, highly incredible. It certainly opened the door to cross examination and the Court did not abuse its discretion in so allowing.

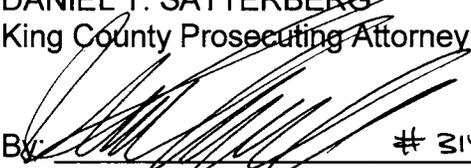
IV. CONCLUSION

For all the foregoing reasons, the State respectfully requests Harris' conviction be affirmed.

DATED this 18th day of June, 2010.

Respectfully submitted,

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