

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

STATE OF WASHINGTON,

Respondent,

v.

GARY G. WESTOM,

Appellant.

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

KATHLEEN WEBBER
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

TABLE OF CONTENTS

I. ISSUES..... 1

II. STATEMENT OF THE CASE..... 1

 1. The Arson..... 1

 2. The Trial..... 4

III. ARGUMENT..... 9

 A. MS. JOHNSON GAVE SUBSTANTIVE TESTIMONY WHICH WAS SUBJECT TO IMPEACHMENT BY PRIOR INCONSISTANT STATEMENTS..... 9

 B. IF THE TRIAL COURT ERRED IN PERMITTING IMPEACHMENT EVIDENCE THE ERROR WAS HARMLESS..... 13

IV. CONCLUSION..... 15

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Allen S., 98 Wn. App. 452, 989 P.2d 1222 (1999), review denied, 140 Wn.2d 1022, 10 P.3d 405 (2000)..... 9, 11, 12

State v. Bourgeois, 133 Wn.2d 389, 945 P.2d 1120 (1997) 14

State v. Delaney, 161 Wash. 614, 297 P. 208 (1931) 13

State v. Hancock, 109 Wn.2d 760, 748 P.2d 611 (1988) 9, 11, 12

State v. Lavaris, 106 Wn.2d 340, 721 P.2d 515 (1986)..... 9, 11

State v. Stingley, 161 Wash. 690, 2 P.2d 61 (1931)..... 12, 13

FEDERAL CASES

Kuhn v. United States, 24 F.2d 910 (9th Cir.) cert. denied, 278 U.S. 605, 49 S.Ct. 11, 73 L.Ed. 533 (1928)..... 13

U.S. CONSTITUTIONAL PROVISIONS

Fifth Amendment..... 4, 5, 6

COURT RULES

ER 402 10

ER 403 10

ER 607 9

I. ISSUES

1. Where a witness gave substantive evidence which assisted the defense, was it error to permit evidence that the witness had previously said something different in order to impeach her on the specific evidence testified to?

2. Even if it was error to admit impeachment evidence, was the error harmless?

II. STATEMENT OF THE CASE

1. The Arson.

On September 18, 2009 Mandi Wagner and her boyfriend Josh Lamoreaux were hosting a poker party at their home located at 501 Alder in Sultan, Washington. Ms. Wagner and Mr. Lamoreaux live in a double wide mobile home with a covered porch that runs about half way down the side of the home. The party was held on the porch. There were three children present at the time. Ms. Wagner and Mr. Lamoreaux's two children were inside; Ms. Wagner's sister's one year old child was outside with her mother and the other adults on the porch. 1 RP 60-62; 2 RP 91, 93-95.

About 8:00 p.m. a fight broke out one block down the street from the Wagner-Lamoreaux home on Fourth and Alder. The fight involved between nine and twenty people. It appeared to be in

front of a home whose occupants Ms. Wagner identified as having been a problem in the neighborhood. 1 RP 34-36, 63-64; 2 RP 96-98.

Darbi Stine had been at 410 Alder most of the day. Just before the fight broke out she and her boyfriend went to the store. As they were entering the store she saw the defendant, Gary Westom, his girlfriend Lynnette Johnson, and two men leaving the store. Ms. Stine and her boyfriend were in the store for only a few minutes. As they returned to the house Ms. Stine saw the fight in the middle of the street on Fourth and Alder. The fight involved the defendant, his two male friends, and some of the men who had been at the home where Ms. Stine had come from. After the fight broke up the defendant came back and said to the others "you all niggers are going to burn." 2 RP 123-132.

Almost two hours later, at 9:50 p.m. the defendant drove up in a white van. He had a gas can with a rag in the spout. He pulled his hood over his head and walked to the Wagner-Lamoreaux home. He lit the gas can and then threw it toward the home. The can hit the roof of the porch and fell on the porch. It caused a fire on the porch carpet and one of the guest's pant legs. Mr.

Lamoreaux quickly extinguished the fire with a fire extinguisher. 1 RP 38-40, 49, 65-69; 2 RP 79-80, 99-103, 132-135, 140.

After the defendant threw the gas can at the Wagner-Lamoreaux home he fled back to the van. Several of the guests chased after him. The defendant got in the van and fled the area. 2 RP 139-141, 198-203.

Ms. Wagner called the police who arrived within minutes. Ms. Stine identified the defendant as the person who threw the gas can. A few days later police located the defendant and arrested him for the arson. The defendant told police that he had been in the fight earlier in the evening when people from the Alder house jumped him and his friends. The defendant said he was a gangster, and did not need police help for that kind of thing. The defendant said he went to his friend Darrold Johnson's after that, where he and his girlfriend Lynnette Johnson stayed until midnight. The defendant denied throwing a flaming gas can on the Walker-Lamoreaux home. Mr. Johnson told police the defendant had not been at his home on September 18, but had begun staying there for three or four days after that. 1 RP 38, 42, 70; 2 RP 224-234, 240-244.

Police also contacted Lynnette Johnson. Ms. Johnson confirmed that the defendant and his friends had been in a fight with some other men. She told police that she and the defendant had been driven back to the area in a white van by some "guy". Ms. Johnson stated that they stopped at a gas station on the way where the defendant pumped gas into a gas can. She told police that once they got to Sultan they went back to Alder where the defendant got out of the van. Ms. Johnson said she thought the defendant was going to beat someone up. She got out of the van and walked away. Several minutes later she was picked up by the van and they drove off. 1 CP 90.

2. The Trial.

The defendant was charged with one count of first degree arson. 1 CP 91. Prior to trial the defense sought to exclude Ms. Johnson's testimony because she now stated that she did not remember anything and she would assert her Fifth Amendment right to remain silent. 1 CP 55, 59. The prosecutor explained that in an interview prior to trial Ms. Johnson had met with him and Ms. Johnson's attorney. Ms. Johnson told the prosecutor that she did not want to testify, that she would claim that she did not remember, and that she would claim her Fifth Amendment privilege. 1 RP 3.

The prosecutor then represented to the court that he had a good faith belief that Ms. Johnson would ultimately testify consistently with her previous statement to the police for two reasons. First there was a video tape showing Ms. Johnson at the store just before the fight and there was a second video tape showing Ms. Johnson in the area of the fire just before it occurred. Those video tapes would be offered to corroborate the testimony of the State's one eye-witness, Darbi Stine, who identified the defendant as the arsonist. Second, the date was significant to Ms. Johnson because it was the tenth anniversary of the death of Ms. Johnson's son. The defense objected to calling Ms. Johnson on the basis that the State knew she would either testify she did not remember the events or that she was assert her Fifth Amendment right to remain silent. 1 RP 5-16.

The trial court denied the motion to exclude Ms. Johnson's testimony. The trial judge observed:

In regards to the Fifth Amendment situation, I've seen witnesses that have said that they're going to take the Fifth Amendment and they don't take the Fifth Amendment. I've seen witnesses who have said that they are going testify, and they take the Fifth. So you really don't know until they raise their little right hand and I raise my right hand and I swear them in and they take the stand.

1 RP 17.

The court outlined the circumstances under which Ms. Johnson could be impeached. While the State could use the video tapes and the anniversary of Ms. Johnson's son's death to attempt to refresh her recollection should she testify that she had no memory of the date, if she persisted in claiming memory loss the State would not be permitted to produce any evidence of her prior statements to police. 1 RP 17-20.

The court held a hearing outside the presence of the jury at the point of the trial where the State intended to call Ms. Johnson to testify. The court attempted to clarify with counsel for Ms. Johnson whether she was going to claim memory loss or assert the Fifth Amendment privilege. The court stated it would not honor a request to assert the privilege if she was going to claim memory loss and the privilege, but would honor the request if she were to solely assert the privilege. The court further noted that in that case the State was prepared to grant Ms. Johnson immunity. Counsel for Ms. Johnson stated that she intended to testify to the best of her recollection, but then asked for a pre-emptive grant of immunity. The request was denied and Ms. Johnson was called to testify. 3 RP 290-294.

During the course of her testimony Ms. Johnson confirmed she was the defendant's girlfriend and that she and the defendant were friends of Darrold Johnson and his girlfriend. 3 RP 296-298. Ms. Johnson claimed she had no memory of most of the events of September 18. 3 RP 299-300. The prosecutor showed Ms. Johnson the video tape taken from the store surveillance camera. While she admitted she was the person in the video, she denied that it refreshed her recollection that she had been in the store around 7:40 p.m. 3 RP 300-302.

The prosecutor then showed Ms. Johnson a video taken from the Sultan Visitors Center surveillance camera taken at 9:50 on September 18. Ms. Johnson testified "I thought we were at Darrold and Amy's house." Ms. Johnson denied that she was the person identified in the Visitors Center video. 3 RP 303-305.

At that point the court held a hearing outside the presence of the jury. The prosecutor argued Ms. Johnson had given substantive evidence on two points; where she and the defendant had been at the time of the arson and that she was not the person depicted in the Visitors Center video. The prosecutor sought to impeach her on those two points with her prior inconsistent

statements. The court granted the motion as to those two specific points. 3 RP 306-310.

Ms. Johnson then testified:

Q: Ms. Johnson do you remember talking to Detective Vanderweyst on September 26 of 2009?

A: No.

Q: Do you remember telling Detective Vanderweyst that on the evening of September 18 of 2009 that you, your boyfriend, the defendant, arrived at approximately Fourth and Alder in a white van?

A: No.

Do you remember telling Detective Vanderweyst that after your boyfriend, the defendant left that white van, that you got out of the van and walked down Fourth Street down to Main Street in Sultan?

A: No I don't recall saying that.

3 RP 310-311.

Detective Vanderweyst then testified that on September 26, 2009 he interviewed Ms. Johnson. During the course of that interview Ms. Johnson told him that she and the defendant arrived in a white van at the area of Fourth and Alder. She further stated that when the defendant left the van that she got out of the van and walked down Fourth to Main Street. 3 RP 312.

III. ARGUMENT

A. MS. JOHNSON GAVE SUBSTANTIVE TESTIMONY WHICH WAS SUBJECT TO IMPEACHMENT BY PRIOR INCONSISTANT STATEMENTS.

The defendant argues evidence of Ms. Johnson's statements to Detective Vanderweyst were erroneously introduced because the State's primary purpose in introducing that evidence was to put otherwise inadmissible hearsay before the jury. He argues the introduction of that evidence was not harmless, and he is therefore entitled to a new trial.

"The credibility of a witness may be attacked by any party, including the party calling the witness." ER 607. A party need not be surprised by the testimony in order to impeach it. State v. Hancock, 109 Wn.2d 760, 763, 748 P.2d 611 (1988). A party may not call a witness when the primary purpose is to elicit testimony in order to impeach the witness with testimony that would be otherwise inadmissible. State v. Lavaris, 106 Wn.2d 340, 345, 721 P.2d 515 (1986).

The court analyzed when the "primary purpose" for impeachment was established in State v. Allen S., 98 Wn. App. 452, 989 P.2d 1222 (1999), review denied, 140 Wn.2d 1022, 10 P.3d 405 (2000). There the court stated that who could be

impeached is a question of relevance under ER 402. Impeachment evidence is only relevant if it tends to cast doubt on the credibility of the witness being impeached, and the credibility of that person is a fact of consequence to the action. Id. at 459.

When the credibility of the person being impeached is a fact of consequence to the action, the impeaching party may be offering the evidence for either of two purposes – to impeach or to prove its substance – and the impeaching party’s “primary purpose” may be open to debate. But when the credibility of the person being impeached is not a fact of consequence to the action, the impeaching party’s purpose cannot be impeachment, and its ‘primary purpose’ – indeed, its *only* purpose – is to admit evidence for substantive use

Id. at 465 (emphasis in the original).

The court suggested that any debate regarding the party’s “primary purpose” should not rest on a proponent’s subjective state of mind. Rather the court should consider the probative value of the evidence in light of its prejudicial effect under ER 403. Id. at 465, n. 57.

The credibility of a witness is not a fact of consequence to the action when the witness gives no substantive evidence which either proves or disproves the charge. However the witnesses’ credibility is a fact in issue when the witness does testify to some substantive evidence.

In Hancock the court found no error in admitting evidence which impeached the defendant's wife because she gave testimony that affirmatively supported her husband's defense, even though she also testified that she did not remember any conversation with the police. Hancock, 109 Wn.2d at 765. In Lavaris impeachment evidence was properly admitted because the witness' testimony did support some of the State's other evidence. Lavaris, 106 Wn.2d at 346.

In contrast, a witness was improperly impeached with prior out of court statements when he gave no testimony that was pertinent to the outcome of the case in Allen S. There a witness testified he had no memory of a conversation with a detective in which he related the defendant's confession to the witness. Allen S., 98 Wn. App. at 457. Under these circumstances the witness's credibility was not a fact of consequence to the outcome of the matter and it was improper to admit evidence of the witness's prior statements to police. Id. at 469.

Here the State did not offer Ms. Johnson's testimony so that it could get in her prior statements to Detective Vanderweyst. It is clear from the prosecutor's representations that he expected Ms. Johnson to testify consistently with her prior statement to police,

albeit reluctantly. Ms. Johnson's anticipated testimony as represented by the prosecutor and as outlined in the affidavit of probable cause was pertinent to the outcome of the case because it corroborated much of what Ms. Stine said. It also refuted the defendant's statement to police regarding his whereabouts at the time of the arson.

Ms. Johnson's actual testimony was not like the testimony of the witness in Allen S. because it was not solely a claim that she did not remember anything. She did in fact testify to two substantive matters which supported the defendant's version of events. The testimony which was impeached in this case is therefore just like the testimony at issue in Hancock. Because impeachment testimony was limited to those subjects where Ms. Johnson gave affirmative evidence, her credibility was a fact of consequence to the outcome of the case as to those two subjects. The limited impeachment testimony was therefore properly admitted.

The cases the defendant relies upon do not support his position because in each of those cases the witness gave no substantive evidence. In Stingley the witnesses were not asked about the crime. State v. Stingley, 161 Wash. 690, 2 P.2d 61

(1931). Instead they were asked about statements they made to the prosecutor and sheriff before trial. Each witness claimed he did not remember making those statements. In these circumstances impeachment was improper because neither witness gave substantive evidence. Id. at 696. Unlike the witnesses in Stingley, Ms. Johnson was asked about the events leading up to the crime.

Similarly the witness in Delaney and in Kuhn gave no substantive evidence when the witness testified that he could not remember anything. State v. Delaney, 161 Wash. 614, 297 P. 208 (1931), Kuhn v. United States, 24 F.2d 910 (9th Cir.) cert. denied, 278 U.S. 605, 49 S.Ct. 11, 73 L.Ed. 533 (1928). Unlike the witnesses in either of these cases, Ms. Johnson did not limit her testimony to claims that she did not remember, but gave limited substantive evidence on two points.

B. IF THE TRIAL COURT ERRED IN PERMITTING IMPEACHMENT EVIDENCE THE ERROR WAS HARMLESS.

Finally, the defendant argues the asserted error was not harmless and he is therefore entitled to a new trial. Even if the trial court erred in permitting the limited impeachment testimony here the defendant should not be granted a new trial. When evidence is admitted in violation of an evidence rule the error is harmless

unless within reasonable probabilities the outcome of the trial would have been materially affected had the error not occurred. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

The one point on which Ms. Johnson's testimony was impeached had already been impeached by other evidence. Although Ms. Johnson denied she had been in the area of Fourth and Alder at the time of the arson, video recorded evidence showed she and the white van were there. 2 RP 250-255; 3 RP 263-270. None of Ms. Johnson's prior statement which corroborated Ms. Stine's testimony was introduced. As a result the jury based its verdict solely on its evaluation of Ms. Stine's credibility and the other evidence which corroborated details of her account of events. Under these circumstances, even if the trial court erred in admitting the limited impeachment evidence, it cannot be said the defendant was prejudiced by that error.

IV. CONCLUSION

For the forgoing reasons the State asks the Court to affirm the defendant's conviction.

Respectfully submitted on November 17, 2010.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 
KATHLEEN WEBBER WSBA #16040
Deputy Prosecuting Attorney
Attorney for Respondent



**Snohomish County
Prosecuting Attorney**

Criminal Division
Joanie Cavagnaro, Chief Deputy
Mission Building
3000 Rockefeller Ave., M/S 504
Everett, WA 98201-4046
(425) 388-3333
Fax (425) 388-3572

November 17, 2010

Richard D. Johnson, Court Administrator/Clerk
The Court of Appeals - Division I
One Union Square
600 University Street
Seattle, WA 98101-4170

**Re: STATE v. GARY G. WESTOM
COURT OF APPEALS NO. 65319-9-I**

RECEIVED
NOV 23 2010
16

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

**KATHLEEN WEBBER, #16040
Deputy Prosecuting Attorney**

cc: Washington Appellate Project
Attorney(s) for Appellant

I have enclosed a properly stamped envelope
containing a copy of this document
for the attorney for the defendant that
I am aware of the possibility of perjury under the laws of the
State of Washington that this is true.

Snohomish County Prosecutor's Office
17/11

Administration
Bob Lenz, Operations Manager
Admin East 7th Floor
(425) 388-3333
Fax (425) 388-7172

Civil Division
Jason Cummings, Chief Deputy
Admin East 7th Floor
(425) 388-6330
Fax (425) 388-6333

Family Support Division
Admin East 6th Floor
(425) 388-7280
Fax (425) 388-7295

NOV 19 11:08 AM '10
K

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

THE STATE OF WASHINGTON, Respondent, v. GARY G. WESTOM, Appellant.
--

No. 65319-9-I
AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 17th day of November, 2010, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

WASHINGTON APPELLATE PROJECT
1511 THIRD AVENUE, SUITE 701
SEATTLE, WA 98101

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the Appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 17th day of November, 2010.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line. The signature is cursive and extends to the right of the line.

DIANE K. KREMENICH
Legal Assistant/Appeals Unit