

NO. 66015-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SADIE HUNTOON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAY WHITE

[Handwritten initials]

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. An appellate court's ability to effectively review the original proceedings depends on the record with which it is presented. When the trial court limits cross-examination of a witness and the defendant fails to make an offer of proof as to how the witness would testify, is the issue properly preserved for appeal?

2. A defendant's potential punishment should not be considered by jurors when deciding the defendant's guilt or innocence. Does a trial court abuse its discretion when it limits cross-examination of a witness to prevent the jury from hearing evidence about the length of the jail sentence the defendant is facing?

3. A conviction will not be disturbed on the basis of trial court error if that error is harmless. Where the State presents overwhelming untainted, and uncontradicted, testimonial and forensic evidence that a defendant unlawfully entered another's residence and removed another's property should the defendant's conviction for residential burglary be affirmed even assuming the trial court erred?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged Sadie Huntoon and Phillip Flynn with one count of Residential Burglary. CP 1-5. The State alleged that on or about January 18, 2009, Sadie Huntoon and Phillip Flynn, together, entered and remained unlawfully in the dwelling of Bruce Zarfos, located at 508 Third Ave SE, #103, Pacific. CP 1. At the beginning of the trial, without an objection from the defense, the court granted the State's motion to exclude any evidence or argument concerning the potential punishment the defendant would face. 1RP 18-19¹. The jury convicted Huntoon of Residential Burglary on September 1, 2010. CP 68.

2. SUBSTANTIVE FACTS.

In January of 2009 there was flooding in Pacific, Washington and the surrounding area. 8/26/10 RP 89. As a result of the flood, residents of the Megan's Court apartments were forced to vacate their residences for several days. 8/26/10 RP 89-90. Bruce Zarfos

¹ The Verbatim Report of the Jury Trial consists of four volumes referred to in this brief as 1RP (August 24, 2010); 8/26/10 RP (August 26, 2010); 8/30/10 RP (August 30, 2010); and 9/1/10 RP (September 1, 2010).

is one of the Megan's Court residents whose apartment was flooded. 8/26/10 RP 88-90. Mr. Zarfos and his wife were unable to return to their apartment for more than a week. 8/26/10 RP 90.

While the Zarfos were away, Flynn noticed their apartment was vacant and started to snoop around to see what he could steal. 8/26/10 RP 32. During that time, Flynn was dating Huntoon. 8/26/10 RP 32-32. On January 18, 2009, Flynn and Huntoon rode their bikes to the Megan's Court apartments. 8/26/10 RP 40. Since Flynn had been snooping around, he asked Huntoon if she wanted to go with him to the Megan's Court apartments and take some stuff. 8/26/10 RP 33. Huntoon agreed, and the two of them entered the Zarfos residence. 8/26/10 RP 33-34. Flynn entered the apartment, opened the door for Huntoon, and she came in through the back door. 8/26/10 RP 34-35. While inside, both Flynn and Huntoon, went through the Zarfos' property, in all of the rooms. 8/26/10 RP 35-37, 39. They spent between half an hour to forty-five minutes in the apartment. 8/26/10 RP 39. Flynn took a BB gun, knives, a battery tester and some tools. 8/26/10 RP 35. Huntoon took a pellet gun from one of the drawers in the dresser. 8/26/10 RP 37.

Officer Joshua Hong spotted the two leaving the Megan's Court complex and contacted Flynn. 8/26/10 RP 40-41, 167. Huntoon fled. 8/26/10 RP 40. At the time of the contact, Flynn told Officer Hong that he was with Sadie (Huntoon). 8/26/10 RP 42. Pacific Police Department Officers Hong and Newton contacted Flynn later in the evening at which time he admitted to breaking into the Zarfos' apartment with Huntoon. 8/26/10 RP 43-45, 173-74.

Dana Wallace met Huntoon in early January of 2009 while they were both making makeshift shelter for the flooding victims. 8/30/10 RP 12-13. Wallace and Huntoon have a friend in common, Reed. 8/30/10 RP 13-14. After the burglary, Huntoon went to Wallace's house. 8/30/10 RP 14. Huntoon was nervous and anxious. 8/30/10 RP 15. Reed was at the residence with Wallace, and Huntoon asked Reed to be her alibi. 8/30/10 RP 15. Specifically, Huntoon asked Reed to say the two of them were out to dinner. 8/30/10 RP 15. Huntoon then explained that she needed Reed to cover for her because she and her boyfriend (Flynn) had gone to the Megan's Court apartments to get what they could. 8/30/10 RP 15-16, 19-20. Huntoon also said she had gotten a BB gun that she buried in her grandmother's backyard. 8/30/10 RP 16-18.

Mike Leahy, a latent print examiner, received a red Christmas tin and lid, from the Pacific Police who investigated this burglary, for testing. 8/26/10 RP 132. This Christmas tin belonged to the Zarfos. 8/26/10 RP 93. This tin can was used for candy and cookies, and was at the Zarfos' residence at the time of the burglary. 8/26/10 RP 93-94. Leahy analyzed the tin can for prints and found Huntoon's fingerprints on the can. 8/26/10 RP 122-55. Mr. Zarfos confirmed that Huntoon never had permission to be in his house where the tin can was collected. 8/26/10 RP 94-95.

Flynn was charged with Residential Burglary and pled guilty to Attempted Residential Burglary sometime in September of 2009. 8/26/10 RP 46. The State did not give Flynn any kind of deal or offer in exchange for his testimony against Huntoon at trial. 8/26/10 RP 46-47. By the time the trial took place, Flynn had already been sentenced. 8/26/10 RP 47.

C. ARGUMENT

Huntoon claims the trial court erred in not allowing her to cross-examine Flynn about the penal consequences of Flynn's and

Huntoon's actions; she argues this decision violated her constitutional right to confront adverse witnesses. The Court should reject this claim and affirm the jury's conviction. First, the confrontation clause issue is not preserved for appeal because Huntoon failed to make an offer of proof specifying what testimony she expected to elicit if the trial court allowed her to pursue the line of questioning. Even assuming a sufficient record to permit review, the trial court was within its discretion to limit Huntoon's cross-examination. Finally, the overwhelming untainted evidence of Huntoon's guilt renders the alleged error harmless beyond a reasonable doubt.

1. HUNTOON DID NOT PRESERVE AN ADEQUATE RECORD FROM WHICH TO APPEAL.

Huntoon seeks reversal of her conviction on the basis that the trial court improperly limited her cross-examination of Flynn about Flynn's plea. However, Huntoon did not make an offer of proof specifying the nature of the testimony that she expected to elicit through cross-examination. She therefore failed to provide an

adequate record for review of her objection – which, at trial, was based on ER 609 rather than the constitutional right to confront.²

Generally, a party cannot argue on appeal that the trial court wrongly excluded evidence unless the party makes an offer of proof before the trial court. ER 103(a)(2). It is the duty of a party offering evidence to make clear to the trial court what it is that he offers in proof, and the reason why he deems the offer admissible over the objections of his opponent, so that the court may make an informed ruling. State v. Ray, 116 Wn.2d 531, 539, 806 P.2d 1220, 1225 (1991) (citing Mad River Orchard Co. v. Krack Corp., 89 Wn.2d 535, 537, 573 P.2d 796 (1978)). The offer of proof serves three purposes: it informs the court of the legal theory under which the offered evidence is admissible; it informs the judge of the specific nature of the offered evidence so that the court can assess its admissibility; and it creates a record adequate for review. State v. Ray, 116 Wn.2d at 538.

² The State recognizes that insofar as Huntoon alleges a manifest error affecting a constitutional right she can raise it for the first time on appeal. RAP 2.5(a). However, that does not negate the need for a record that allows meaningful review.

Here, the record does not reveal the substance of the testimony that Huntoon expected to elicit if allowed to cross-examine Flynn on his guilty plea and subsequent sentence. As the trial court noted during the sidebar conference “there is no evidence to contradict [Flynn’s] testimony that [his plea agreement] did not involve a concession...in exchange for his testimony.” 8/26/10 RP 68. Huntoon did not respond with an offer of proof. Instead she renewed her ER 609-based objection. Without knowing the specific nature of the excluded evidence, this Court cannot address Huntoon’s claim of error.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY LIMITING CROSS-EXAMINATION, NOR DID IT VIOLATE HUNTOON'S RIGHT TO CONFRONTATION.

The United States and Washington constitutions provide a criminal defendant the right to confront adverse witnesses. U.S. Const. amend. VI; Washington Const. art. I, § 22 (amend. 10). However, the confrontation right is not absolute. Chambers v. Mississippi, 410 U.S. 284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). Under ER 611(b), the trial court has the discretion to determine the scope of cross-examination.

Whether a trial court has violated an accused's confrontation right is an issue reviewed de novo. State v. Medina, 112 Wn. App. 40, 48 P.3d 1005 (2002). A trial court's decision to limit the scope of cross-examination is reviewed for abuse of discretion. State v. Darden, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002); State v. Campbell, 103 Wn.2d 1, 20, 691 P.2d 929 (1984).

A trial court may, in its discretion, reject cross-examination where the circumstances only remotely tend to show bias or prejudice of the witness, where the evidence is vague, or where the evidence is merely argumentative and speculative. State v. Classen, 143 Wn. App. 45, 58, 176 P.3d 582 (2008). The United States Supreme Court has explained:

[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based upon concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.

Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (emphasis in original).

In other words, there is no constitutional right to an unfettered cross-examination. State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983), noting that

"Like any constitutional right, these rights have limits. Although the defendant has the right to put on relevant evidence, this right may be counterbalanced by the state's interest in seeing that the evidence is not so prejudicial as to disrupt the fairness of the fact-finding process."

State v. Hudlow, 99 Wn.2d at 15.

The right to confront is satisfied if the defendant has the opportunity to bring out the weaknesses in the adverse witness's evidence. State v. Dukes, 56 Wn. App. 660, 662-63, 784 P.2d 584 (1990). And if cross-examination would have limited usefulness, it is not error to exclude it. State v. Wicker, 66 Wn. App. 409, 413, 832 P.2d 127 (1992).

Here, the trial court acted within its discretion to limit the cross-examination of Flynn on the subject of potential punishments for residential burglary and attempted residential burglary. As discussed above, Huntoon did not offer the trial court any proof that Flynn's plea was conditioned on his testifying against her. Absent such proof there was no reason for the court to believe Huntoon could show bias or any other relevant information via the proposed line of questioning. Even if the line of questioning were minimally relevant, the trial court was compelled to exclude it because it would disrupt the fairness of the fact-finding proceeding by

improperly focusing the jury's attention on Huntoon's potential punishment rather than the question of her culpability. *Accord Hudlow*, 99 Wn.2d at 15. This was a tactic for Huntoon to present inadmissible evidence through the back door, and in violation of the court's motion in limine precluding Huntoon from offering evidence or argument concerning punishment.

Huntoon's reliance on Davis v. Alaska is misplaced. Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105 (1974). In Davis, the witness at issue was on probation for burglary. 415 U.S. at 311. He was testifying against individuals charged with burglary for stealing a safe, which had been discovered on the witness's property. Id. at 309. The witness's probation status thus presented a possible motive for him to fabricate testimony on behalf of the State in order to deflect suspicion from himself. Id. at 313-14, 317.

Here, by contrast, Flynn was not on probation when he testified, he had already pled guilty and been sentenced. 8/26/10 RP 46. Nor was his sentence conditioned on his testimony in Huntoon's trial. Thus the factors that underpinned the court's reasoning in Davis are simply not present here.

Huntoon relies on United States v. Mayans for the proposition the right to confront is especially important where the

witness has entered a guilty plea to the crime the defendant is charged with. Brief of Appellant at 6-7. However, Huntoon fails to disclose that the court in Mayans concluded that “what tells...is not the actual existence of a deal but the witness’ <sic> belief that such a deal exists.” Mayans, 17 F.3d 1174, 1184 (9th Cir. 1994); see also United States v. Onori, 535 F.2d 938, 945 (5th Cir. 1976).

Here, of course not only was there no deal between the State and Flynn, but the record clearly established from Flynn's testimony that there was no incentive for him to testify against Huntoon. He had already pled, had already been sentenced and that was completely independent from his testimony against Huntoon.

Finally, absent an offer of proof, the trial court was not required to permit Huntoon to question Flynn as to the length of his sentence just because the State asked him whether he received a deal in exchange for his testimony. Under the “open door” rule, the trial court has the discretion to allow cross-examination into areas that might otherwise not be permitted. State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008). The trial court has considerable discretion in administering the open-door rule; its decision whether to allow cross-examination under this rule is reviewed for abuse of discretion. State v. Ortega, 134 Wn. App. 617, 626, 142 P.3d 175

(2006). A party's introduction of evidence that would be inadmissible if offered by the opposing party "opens the door" to explanation or contradiction of that evidence. State v. Avendano-Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995).

Here, the trial court did not abuse its discretion in finding that the State's inquiry opened the door. The length of punishment would not explain or contradict the absence of a deal between Flynn and the State.

3. ANY ERROR WAS HARMLESS.

Even if the Court concludes the trial court abused its discretion in limiting Huntoon's cross-examination of Flynn, it should still affirm her conviction under harmless error analysis.³

Washington jurisprudence holds that "[a] confrontation clause violation is subject to review for harmless error," a confrontation clause violation does not require automatic reversal. State v. Hieb, 107 Wn.2d 97, 108, 727 P.2d 239, 245 (1986). It is the State's burden to show that the error was harmless. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). A constitutional error is

³ Huntoon concedes -- as she must -- that the doctrine of harmless error applies even when constitutional error is alleged. Brief of Appellant at 10.

harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Watt, 160 Wn.2d 626, 160 P.3d 640 (2007). Washington courts rely on the "contribution" test or the "overwhelming untainted evidence test" to decide whether it appears beyond a reasonable doubt that a fact finder would have reached the same result in the absence of the error. Guloy, 104 Wn.2d at 425-26. Under the "contribution" test, an appellate court looks only at the tainted evidence to determine if that evidence could have contributed to the fact finder's determination of guilt, while under the "overwhelming untainted evidence" test, the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. Id. at 426.

Here, the error is harmless because not allowing Huntoon to cross-examine Flynn as to the length of his sentence did not taint the determination of guilt under either the "contribution" test or the "overwhelming untainted evidence" test. Allowing the cross-examination could have produced only two possibilities: either the jury would still have found Flynn credible or it would not have. If Flynn's credibility remained intact – a supposition the Court should

infer given Huntoon's failure to preserve the record at trial – there would be no change to the verdict. And even assuming Flynn's credibility were impaired, the overwhelming evidence presented by the State's other witnesses would still have undoubtedly led to Huntoon's conviction.

- a. Huntoon's Failure To Make An Offer Of Proof Supports An Inference That She Had No Evidence That Flynn's Sentence Was Linked To His Testimony.

As discussed above, Huntoon failed to preserve this issue for appeal when she chose not to make an offer of proof as to what Flynn would say if cross-examined on the issue of bias.

Flynn had already testified on direct examination that he did not receive any benefit from the State in exchange for testifying. 8/26/10 RP 60-61. Huntoon made no offer of proof that she had any information that would contradict Flynn's testimony or in any way discredit it and on that basis this Court should infer she had no such information. There is nothing in the record to suggest Huntoon could have brought forth *any* evidence that Flynn's sentence was tied to his testimony. Without such a link, there is no rational basis for a trier of fact to discredit Flynn. Before any

rational juror could conclude that Flynn's sentence biased his testimony, he or she would have to believe there was a link between the two. Because she cannot show any evidence of such a link, since there was none, Huntoon cannot argue that the sentence biased the testimony.

This conclusion is buttressed by the fact that the trial court permitted Huntoon wide latitude to confront Flynn in general, allowing questions about his drinking and drug use on the day of the burglary, and, of course, his conviction for attempted residential burglary. 8/26/10 RP 48-49. Huntoon argued in closing that Flynn was the planner and perpetrator of the crime and that this rendered his testimony incredible. 9/1/10 RP 56. The jury simply found the argument unconvincing and there is no reason to believe the jury would have believed otherwise had it known the length of the sentence. Therefore, the Court should conclude that even if the trial court had allowed further cross-examination on the matter, any reasonable juror would still have found Flynn credible.

b. Even Absent Flynn's Testimony, The Overwhelming Evidence Requires Affirmation Of Huntoon's Conviction.

Contrary to Huntoon's contention, Flynn's testimony was hardly the only evidence the State offered to prove her guilt.

Specifically, Huntoon claims that absent Flynn's testimony there was no evidence establishing Huntoon's intent to commit a theft inside the Zarfos residence.

Flynn's testimony was corroborated by the testimony of other witnesses who testified for the State. Dana Wallace's testimony established that Huntoon admitted entering a Megan's Court apartment and removing a BB gun which she subsequently buried in her grandmother's backyard. 8/30/10 RP 16, 19, 26. Similarly, Mr. Zarfos testified that his BB gun was missing from the apartment after the burglary. 8/26/10 RP 92, 97. Ms. Wallace also testified that Huntoon admitted to going to Megan's Court apartments to get what "they" (Flynn and Huntoon) could. 8/30/10 RP 15-16, 19-20. Additionally, there was testimony from Mike Leahy of the King County Sheriff's Office latent print unit that latent fingerprints were left on and inside the tin, which the jury heard belonged to the Zarfos. 8/26/10 RP 122-55. This was consistent with Flynn's testimony that Huntoon also looked through the drawers and the

various rooms of the house. 8/26/10 RP 35-37, 39. Had Huntoon not looked through the property and opened the tin can, her fingerprints would have not been found on the can or inside the can.

This overwhelming evidence was the reason the jury convicted Huntoon. Because jurors would have reached the same conclusion even if Flynn had been permitted to testify about the length of his sentence, the trial court's decision to limit the scope of cross-examination was, at worst, harmless error.

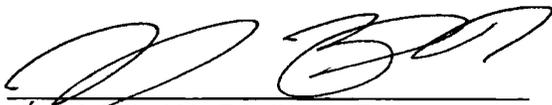
D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Huntoon's conviction for Residential Burglary.

DATED this 16th day of May, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. SADIE HUNTOON, Cause No. 66015-2-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name Jeff Spencer, Paralegal
Done in Seattle, Washington

5/16/2011
Date 05/16/2011