

68022-6

68022-6

No. 68022-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOHN R. FREEMAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable LeRoy McCullough

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence presented by the State to support the jury's verdict that Mr. Freeman was guilty of fourth degree assault.

2. The trial court erred in excluding portions of recorded jail phone calls from Mr. Freeman, which would otherwise be admissible, as self-serving hearsay.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The State bears the burden of proving each element of the charged offense beyond a reasonable doubt. Here, the jury failed to reach a verdict on the count of second degree assault, that Mr. Freeman assaulted Mr. Lawson with a gun, and found him guilty of the lesser offense of fourth degree assault. Where the jury failed to find Mr. Freeman assaulted Mr. Lawson with a firearm, and there was no other evidence presented of an assault, is Mr. Freeman entitled to reversal of his conviction for the State's failure to prove he assaulted Mr. Lawson?

2. When the State moves to admit a redacted version of a recorded statement of the defendant under ER 106, the rule of completeness, the defendant may admit additional portions of

the statement to put the statement in context. The trial court here refused to allow Mr. Freeman to admit any portion of his recorded jail calls under the theory that they constituted “self-serving hearsay,” a doctrine which does not exist. Is Mr. Freeman entitled to reversal of his convictions and remand for a new trial?

C. STATEMENT OF THE CASE

Johnnie Lawson was working security at a concert at the Monte Carlo Casino in Tukwila. RP 173-76. After the show was over, Mr. Lawson was standing outside the casino, ensuring the crowd cleared out of the parking lot. RP 179. As he stood outside, Mr. Lawson claimed he saw a man he later identified as John Freeman pointing a handgun at him. RP 190. Mr. Lawson claimed he had had no prior contact with Mr. Freeman. RP 191. According to Mr. Lawson, Mr. Freeman stood there for about 30 seconds, and then fled. RP 193.

Anthony Reynolds was working as a bodyguard for the marquee attraction at the Casino. RP 228-33. While escorting the promoter’s mother, who was carrying the evenings’ cash, to her car, he looked over and saw Mr. Freeman pulling out a

firearm. RP 240-44. Mr. Reynolds drew his own firearm and told Mr. Freeman to drop the gun. RP 250. Mr. Freeman fled. RP 251.

Tukwila Police officers, responding to an unrelated shooting call at the Casino, saw security people chasing another man, who the police later identified as Mr. Freeman. RP 115-16, 125-26, 283-87, 295-300. The security people claimed Mr. Freeman had a gun. RP 125. Tukwila Officer Bonagofski joined the mob chasing Mr. Freeman. RP 126. As Mr. Freeman tried to climb a nearby wall, Bonagofski utilized a Taser on him, causing Mr. Freeman to drop something from his waistband. RP 300. The police ultimately stopped Mr. Freeman and took him into custody. RP 135. A silver firearm was discovered at the base of the wall Mr. Freeman fled over. RP 137, 302-03.

Mr. Freeman was charged with second degree assault, under the assault with a firearm alternative means, and unlawful possession of a firearm in the first degree. CP 16-17.

The firearm was checked for fingerprints by a latent print examiner and none were found. RP 407-10. DNA testing on the firearm revealed a mixed profile; the DNA of more than two

people. RP 491-95. Mr. Freeman was not excluded as a contributor, but the confidence level was very low; it was estimated that one in 54 people could have been included within this mixed profile. RP 496.

The jury was unable to reach a verdict on the second degree assault count, finding Mr. Freeman guilty of the lesser degree offense of fourth degree assault. CP 52-53; RP 635. The jury also found Mr. Freeman guilty as charged of the unlawful possession count. CP 54, RP 635.

D. ARGUMENT

1. SINCE THE JURY FOUND MR. FREEMAN DID NOT COMMIT AN ASSAULT WITH A FIREARM, AND THE EVIDENCE SHOWED HE DID NOT COMMIT ANY OTHER ASSAULT, HIS FOURTH DEGREE ASSAULT CONVICTION CANNOT STAND

a. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt. The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358,

364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

b. The jury's verdict finding Mr. Freeman had not assaulted anyone with a firearm foreclosed the jury from finding him guilty of fourth degree assault. The State charged Mr. Freeman with assaulting Mr. Lawson with a deadly weapon. CP 16. The jury refused to convict, instead convicting Mr. Freeman of the lesser degree of fourth degree assault. CP 52-53. Mr. Freeman submits there was no evidence presented to support the fourth degree assault conviction.

The State had to prove that Mr. Freeman intentionally assaulted Mr. Lawson with a deadly weapon. RCW

9A.36.021(1)(c); *State v. Wade*, 133 Wn.App. 855, 872-73, 138 P.3d 168 (2006). Jury instruction 10 stated that a firearm is a “deadly weapon.” CP 31.

On the other hand, fourth degree assault is essentially an assault with little or no bodily harm, *committed without a deadly weapon*. RCW 9A.36.041(1); *State v. Hahn*, ___ Wn.2d ___, 271 P.3d 892, 893 (2012).

Here, the only evidence presented by the State was that Mr. Freeman was seen with a gun pointed at Mr. Lawson, who felt threatened. The State did not present evidence of any other conduct against Mr. Lawson that would constitute an assault by Mr. Freeman. In light of the jury’s inability to convict Mr. Freeman of assault with a deadly weapon, and in light of the lack of any evidence of another assault on Mr. Lawson, there was no evidence to support the fourth degree assault verdict.

c. Mr. Freeman is entitled to reversal of his second degree malicious mischief conviction with instructions to dismiss. Since there was insufficient evidence to support the fourth degree assault conviction, this Court must reverse the conviction with instructions to dismiss. To do otherwise would

violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution “forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.”), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

2. THE TRIAL COURT’S BLANKET BAR OF ANY OF MR. FREEMAN’S RECORDED STATEMENTS OFFERED ON HIS BEHALF AS “SELF-SERVING HEARSAY” VIOLATED HIS RIGHT TO PRESENT A DEFENSE

As part of its case-in-chief, the State moved to admit a redacted version of recordings of jail telephone calls by Mr. Freeman. RP 449. Mr. Freeman sought to admit additional portions of the recordings that the State had redacted to put Mr. Freeman’s statements in context. RP 418-77.

[T]he defense does believe that we need to introduce other parts of the writing or recorded statements so that my client can get a fair trial. We believe that these statements should be considered contemporaneously with the other statements that have been reacted.
...

I'm making my record and I'm asking the Court include these statements because I believe that the way in which it's redacted misleads and give [sic] a misleading impression about what my client is doing at the time.

RP 449, 452.

The prosecutor's sole objection was that the portions sought by Mr. Freeman constituted "self-serving hearsay." RP 424. The trial court agreed with the prosecutor, even where the statements were taken out of context and Mr. Freeman's requested portions would return the statement to its proper context. RP 426 ("But if the context is lost, but at the same time the self-serving hearsay is out, are you asking the Court to admit what is arguably self-serving hearsay?"). Mr. Freeman urged admission was authorized by the rule of completeness under ER 106, to which the trial court replied: "And then there's another rule that talks about self-serving hearsay. Request denied." RP 458.

Mr. Freeman subsequently objected to the admission at trial of the redacted jail telephone calls. RP 515-16.

a. A defendant has the constitutionally protected right to present a defense which encompasses the right to present relevant testimony. It is axiomatic that an accused person has the constitutional right to present a defense. U.S. Const. Amend. VI; *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). The right to present evidence in one's defense is a fundamental element of due process of law. *United States v. Whittington*, 783 F.2d 1210, 1218 (5th Cir., 1986), *citing Washington v. Texas*, 388 U.S. 14, 17-19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *State v. Ellis*, 136 Wn.2d 498, 527, 963 P.2d 843 (1998). This right includes, “at a minimum . . . the right to put before a jury evidence that might influence the determination of guilt.” *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987); *accord Washington*, 388 U.S. at 19 (“The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant’s version of the facts . . . [The accused] has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.”).

Washington defines the right to present evidence on one's own behalf as a right to present material and relevant evidence. Const. Art. I § 22; *State v. Roberts*, 80 Wn.App. 342, 350-51, 908 P.2d 892 (1996) (reversing conviction where defendant was unable to present relevant testimony). The defense bears the burden of proving materiality, relevance, and admissibility. *Id.*

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington, 388 U.S. at 19.

The right to present a defense is abridged by evidence rules that “infring[e] upon a weighty interest of the accused” and are “‘arbitrary’ or ‘disproportionate to the purposes they are designed to serve.’” *Holmes*, 547 U.S. at 324-25, citing *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998), quoting *Rock v. Arkansas*, 483 U.S. 44, 56, 58, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987).

The evidence sought to be admitted by the defendant need only be “of at least minimal relevance.” *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010), *quoting State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). If the evidence is relevant, the burden shifts to the State to prove “the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Id.*

b. Contrary to the trial court’s ruling, there is no “self-serving” hearsay bar in the evidence rules. The trial court relied solely on a “self-serving hearsay” rule in barring Mr. Freeman from adding additional portions of his statements in the recorded jail phone calls in order to complete and balance the State’s version of the calls it sought to admit. In light of the fact there is no “self-serving hearsay” bar in the Rules of Evidence, Mr. Freeman is entitled to reversal of his convictions and remand for a new trial.

Division Three of this Court recently explained that there is no “self-serving hearsay” rule that bars admission of statements that would otherwise satisfy a hearsay rule exception. *State v. Pavlik*, 165 Wn.App. 645, 654, 268 P.3d 986

(2011) (“We hold that there is no ‘self-serving hearsay’ bar that excludes an otherwise admissible statement.”). The Court noted initially that Washington adopted the Rules of Evidence in 1979, and one of those rules provided that a statement is not hearsay if it is offered against a party and is the party's own statement. *Id.*, at 651-52, *citing* ER 801(d)(2). Prerule cases admitted such admissions by party-opponents as hearsay exceptions instead of excluding them from the hearsay definition altogether. Under this approach, admissions of a party were hearsay but admissible against the party if relevant. *Pavlik*, 165 Wn.App. at 652. It is against this backdrop that the reference to self-serving hearsay was made. *Id.*, at 653, *citing State v. Huff*, 3 Wn.App. 632, 636, 477 P.2d 22 (1970), *review denied*, 79 Wn.2d 1004 (1971). As the Court stated in *Huff*:

Out-of-court admissions by a party, although hearsay, may be admissible against the party if they are relevant. However, if an out-of-court admission by a party is self-serving . . . in the sense that it tends to aid his case, and is offered for the truth of the matter asserted, then such statement is not admissible under the admission exception to the hearsay rule.

3 Wn.App. at 636 (citations omitted).

Subsequent cases citing this alleged bar to self-serving statements failed to recognize it as prerule authority. *Pavlik*, 165 Wn.App. at 653. The rules of evidence contain no self-serving hearsay bar that excludes an otherwise admissible statement. *Id.*, at 653-54. See also *State v. King*, 71 Wn.2d 573, 577, 429 P.2d 914 (1967) (“self-serving” is shorthand way of saying a statement is hearsay and does not fit within a recognized exception to the hearsay rule). Rather, admissibility must be addressed under the recognized exceptions to the hearsay rule. *Pavlik*, 165 Wn.App. at 653-54.

The trial court relied solely on the “self-serving hearsay” rule to bar Mr. Freeman from admitting additional portions of his recorded phone calls. In light of the fact that there is no “self-serving hearsay” bar, the trial court erred. *Id.* at 654.

c. Mr. Freeman’s recorded statements were admissible under the rule of completeness under ER 106. Mr. Freeman unsuccessfully relied upon ER 106, the rule of completeness, in urging the court to add portions of his statement originally redacted by the State. The trial court never ruled on whether the statements were admissible under

ER 106, instead excluding them solely because the court believed the statements were “self-serving hearsay.”

Rule 106 of the Federal Rules of Evidence states:

When a writing of recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

State v. Larry, 108 Wn.App. 894, 909-10, 34 P.3d 241 (2001),
review denied, 146 Wn.2d 1022 (2002).¹

ER 106 requires the court to admit other parts of a statement that are necessary to prevent the jury from misinterpreting the admitted statements. The purpose of the ER 106 rule of completeness is to protect against creating a “misleading impression.” 5 Karl B. Tegland, *Washington Practice: Evidence*, § 106.1 at 115 (4th ed.1999). Under the Rule, “a party against whom a fragmentary statement is introduced may demand that any other part of the statement be admitted as would be necessary to clarify or explain the portion

¹ Washington’s rule is substantially similar to the federal rule and review of federal decisions and treatises can be helpful in interpreting the rule. 5 Karl B. Tegland, *Washington Practice: Evidence*, § 106.1 at 146 (5th ed. 2007).

already received, and thus to avoid any misleading impression that would be created by offering the statement outside its true context.” *United States v. Glover*, 101 F.3d 1183, 1189 (7th Cir.1996).

To satisfy ER 106, the trial court must admit the “remaining portions of the statement which are needed to clarify or explain the portion already received.” *Larry*, 108 Wn.App. at 910. Additional portions of a statement are necessary under ER 106 if they (1) explain the admitted evidence, (2) place the admitted portions in context, (3) avoid misleading the trier of fact, and (4) insure fair and impartial understanding of the evidence. *Id.*, citing *United States v. Haddad*, 10 F.3d 1252 (7th Cir.1993).

The trial court abuses its discretion when it refuses to admit relevant admissible portions of such redacted statements. *Larry*, 108 Wn.App. at 910, citing *United States v. Dorrell*, 758 F.2d 427, 434-35 (9th Cir., 1985).

Regarding a defendant’s “self-serving hearsay:”

Ordinarily a defendant's self-serving, exculpatory, out of court statements would not be admissible. But here the exculpatory remarks were part and

parcel of the very statement a portion of which the Government was properly bringing before the jury, i.e. the defendant's admission about the marijuana.

Larry, 108 Wn.App. at 909, *quoting Haddad*, 10 F.3d at 1258.

In *Haddad*, the Seventh Circuit ruled the trial court erred in refusing to admit additional portions of a defendant's statement under the federal version of ER 106 after applying the four part test, and where the defendant did not testify. *Haddad*, 10 F.3d at 1259. The issue concerned the defendant's knowledge of a gun in an unlawful possession of a firearm prosecution:

The marijuana that Mr. Haddad admitted placing under the bed was only six inches from the implicated gun. The defendant in effect said "Yes, I knew of the marijuana but I had no knowledge of the gun." The admission of the inculpatory portion only (i.e. that he knew of the location of the marijuana) might suggest, absent more, that the defendant also knew of the gun. The whole statement should be admitted in the interest of completeness and context, to avoid misleading inferences, and to help insure a fair and impartial understanding of the evidence.

*Id.*²

The same was true here with Mr. Freeman. The portions of the recorded phone calls he sought to be admitted put the other portions sought by the State in context, avoided

² The Court ultimately found the error harmless. *Id.*

misleading inferences, and would have helped insure he received a fair trial. The portions sought to be admitted by Mr. Freeman were admissible under the rule of completeness.

d. Mr. Freeman is entitled to reversal of his convictions and remand for a new trial. Mr. Freeman submits that the court's error in refusing to admit the requested portions of his phone calls was not harmless and must result in reversal of his convictions.

A violation of the right to present a defense requires reversal of a guilty verdict unless the State proves that the error was harmless beyond a reasonable doubt. *Ritchie*, 480 U.S. at 58; *Chapman v. California*, 386 U.S. 18, 21-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *State v. Maupin*, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996).

Alternatively, an error in misapplying the rule of completeness is a nonconstitutional error. Nonconstitutional error is harmless if, within reasonable probabilities, it did not affect the verdict. *Pavlik*, 165 Wn.App. at 656, *citing State v. Zwicker*, 105 Wn.2d 228, 243, 713 P.2d 1101 (1986).

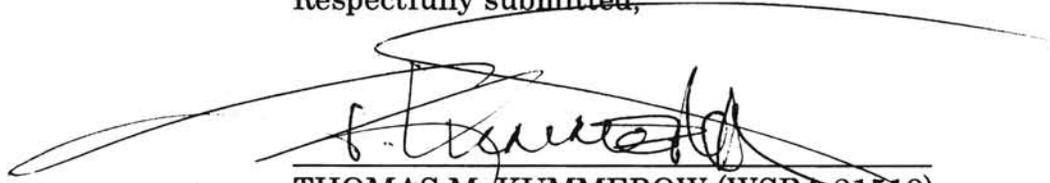
While there were witnesses that claimed they observed Mr. Freeman in possession of a firearm, there were no fingerprints recovered and the DNA, which would have corroborated these witnesses was, to put it in its best light, weak. During his closing argument, the prosecutor repeatedly relied upon the redacted version of Mr. Freeman's recorded phone calls to buttress his argument that Mr. Freeman possessed the gun. RP 585, 594, 602-04. The prosecutor played the redacted version of all of the phone calls admitted for the jury, then added his own commentary regarding Mr. Freeman's statements. RP 602-04. Had the additional statements sought by Mr. Freeman been added, the statements admitted at the onus of the State would have been put in their proper context. In this new light, the jury may have seen the State's proffered evidence differently and concluded the State had failed to prove Mr. Freeman was in possession of the gun. Since the trial court's error most probably affected the verdict, it is not harmless and must result in reversal of Mr. Freeman's conviction.

E. CONCLUSION

For the reasons stated, Mr. Freeman requests this Court reverse his conviction for fourth degree assault with instructions to dismiss. In addition, Mr. Freeman requests this Court reverse his conviction for unlawful possession of a firearm and fourth degree assault and remand for a new trial due to the improper exclusion of otherwise admissible evidence.

DATED this 13th day of June 2012.

Respectfully submitted,

A large, stylized handwritten signature in black ink, appearing to read 'T. Kummerow', is written over a horizontal line. The signature is highly cursive and extends across the width of the text block below it.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 68022-6-I
v.)	
)	
JOHN FREEMAN,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF JUNE, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON

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