

70235-1

70235-1

NO. 70235-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY THOMPSON,

Appellant.

REC'D
MAR 18 2014
King County Prosecutor
Appellate Unit

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

The Honorable Monica Benton, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred in excluding a statement offered by appellant as a declaration against a third party declarant's penal interest under ER 804(b)(3).

Issue Pertaining to Assignment of Error

Appellant sought to introduce recorded statements made by an unavailable witness to police in which she detailed her involvement in prostitution and denied appellant participated in, or benefited from, her prostitution. Appellant argued the witness' statements were admissible as statements against her penal interest under ER 804(b)(3).¹ The trial court excluded the statements, finding they were not trustworthy and not against appellant's penal interests. Where the trial court misunderstood the

¹ ER 804(b)(3) provides in pertinent part:

(b) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(3) Statement Against Interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true. In a criminal case a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

requirements of ER 804(b)(3) and did not apply a nine-part test to determine trustworthiness of the statements, did the trial court's refusal to admit the unavailable witness' statement violate ER 804(b)(3) and appellant's constitutional right to present a defense?

B. STATEMENT OF THE CASE

1. Trial Testimony

In July 2011, Malina Brown called police after hearing “lots of noise” in the supposedly vacant apartment above hers. 13RP² 9, 15-16. Brown also saw several men she did not recognize near the apartment. 13RP 18-19.

Appellant Anthony Thompson lived in an apartment next door to Brown. 13RP 8-9, 11. Brown had seen Thompson on the balcony of the vacant apartment before. 13RP 16-17. When police arrived, they saw Thompson “duck” behind a car before entering a nearby apartment. 13RP 22-24, 30-31; 16RP 12-14.

² This brief refers to the verbatim report of proceedings as follows: 1RP – November 30, 2012, January 31, 2013, March 21, 2013; 2RP – December 5, 2012; 3RP – December 12, 2012; 4RP – December 13, 2012; 5RP – January 3, 2013; 6RP – January 4, 2013; 7RP – January 7, 2013; 8RP – January 8, 2013; 9RP – January 9, 2013; 10RP – January 10, 2013; 11RP – January 16, 2013; 12RP – January 17, 2013; 13RP – January 22, 2013; 14RP – January 23, 2013; 15RP – January 24, 2013; 16RP – January 29, 2013; 17RP – January 30, 2013.

The vacant apartment was unlocked. 13R 45. Police found blood splatter and a bag of used condoms next to a mattress. 14RP 82-84; 16RP 39-40; 17RP 17. A blood trail led from the vacant apartment to Thompson's. An injured dog was on the porch of Thompson's apartment. CP 20. Police spoke with Arianna Morrow and Thompson's roommate, Ronald Wallace, after they exited the apartment. 13RP 26-28, 42-43. Thompson came out of the apartment when called by police. 13RP 28, 43-44.

Police interviewed Thompson after his arrest. 14RP 75. Thompson said he knew Morrow by her nickname "Sunny." 14RP 77. He denied being in a relationship with Morrow. 17RP 23.

A cell phone taken from Thompson was registered to an account in Morrow's name. 14RP 75-77, 90; 17RP 15-16. The phone contained videos of Thompson inside the vacant apartment. 14RP 101. Several pictures of Morrow were on the phone. 14RP 101, 113, 126-27, 136, 161; 16RP 85-87, 90-95. Some of those pictures were also on the website backpage.com, which police opined was an outlet for escort advertisements in Seattle. 14RP 64, 161-62, 164-64, 168-71; 16RP 85-87, 90-95. The website was listed in the phone internet history. 14RP 146-50, 155-57.

The phone also contained text messages to a telephone number listed on Morrow's backpage advertisement. 14RP 174-75. One text message acknowledged reposting of an advertisement. Other messages referenced the need for more condoms and money received from "jugs." 16RP 116, 121-136.

Meanwhile, police searched Thompson's apartment. Shoes Thompson was wearing in a cell phone video were found in a bedroom. A credit card used on backpage.com and other documents with Thompson's name were also found in the bedroom. 14RP 28, 30, 43-45, 54, 59, 135; 15RP 23-24, 35-36, 119; 17RP 11-12.

Police seized a computer found in a hall closet. 14RP 33, 78-79; 15RP 38, 51, 64; 17RP 11. The computer contained photographs and internet history for backpage.com. 15RP 76-88, 93, 141-47. Inside the computer was .22 caliber handgun and .22 caliber ammunition. 14RP 178-85; 15RP 67-69. A partial box of .22 caliber ammunition was found in the trunk of car registered in Thompson's name. 15RP 72, 74-76. .22 caliber shell casings were found near the road outside Thompson's apartment. 14RP 10, 13, 20, 47-49; 15RP 41. Police could not determine how long the shell casings had been outside or whether they were fired from the seized .22 caliber handgun. 14RP 48, 74; 15RP 42, 71.

Thompson's fingerprints were not found on the computer, handgun, handgun magazine, or ammunition. 15RP 172-73, 183-84. Thompson's DNA was not found on the ammunition. 15RP 50, 59. Testing of the handgun and magazine revealed a mixture of three DNA profiles. 15RP 48-50, 56, 59. Thompson's DNA reference was "included" within that profile. 15RP 49-51, 60. Forensic scientist, Jennifer Reid, acknowledged she could not determine whether Thompson ever touched the handgun or magazine. 15RP 39, 49-51.

Jail telephone calls between Morrow and Thompson discussed money and what to do with it. Other jail telephone calls between Thompson and Wallace discussed what property was removed by police from the apartment. A telephone call between Thompson and his mother discussed obtaining work for Morrow so she could pay for Thompson's bail amount. 2RP 32; 13RP 67-68, 73; 16RP 140-47; 17RP 32-33.

Based on this evidence, Thompson was charged with one count each of second degree promoting prostitution and first degree unlawful possession of a firearm, and four counts of animal fighting. CP 16-18. Thompson pled guilty to each count of animal fighting. 1RP 37; 7RP 3-16; CP 356-68. Thompson continued to trial on the promoting prostitution and unlawful possession charges.

After hearing the above, a King County jury found Thompson guilty as charged. 1RP 30-33; CP 419-20. The trial court sentenced Thompson to standard range concurrent prison sentences of 116 months for promoting prostitution, 51 months for unlawful possession, and 1 day each for animal fighting. 1RP 47-49; CP 438-47. Thompson timely appeals. CP 478-89.

2. Morrow's Statements

On July 25, 2011 Morrow gave a recorded interview to Detective John Pavlovich. During the interview, Morrow acknowledged engaging in prostitution since she was 16 years old. Morrow explained:

When I met [Thompson], I was already doing it. Before I met him, I was doing it. After I met him, I continued to do it. It's my decision. It's my life. It's what I choose to do. He's never influenced me. He has never said you shouldn't do this, but he's never said go do this. He's never dropped me off anywhere. He's never taken me on any calls. He's just my boyfriend. I call him when I want to fuck him.

Supp. CP ___ (sub no. 140, State's Memorandum on Statement Against Interest, at 20).

Morrow further explained how many days per week she engaged in prostitution and her hourly rate. When asked whether Thompson "set up any dates," for her or received "any of the money" she made, Morrow responded "no." Supp. CP ___ (sub no. 140, State's Memorandum on Statement Against Interest, at 20).

Thompson sought to introduce Morrow's statements to Detective Pavlovich about her involvement in prostitution as statements against her penal interest under ER 804(b)(3). Morrow could not be found to testify at trial. CP 391-93. Thompson therefore intended to introduce the statements during cross-examination of Pavlovich. 16RP 6-7.

Specifically, defense counsel wanted to admit Morrow's statements denying that Thompson helped her "facilitate dates," denying that she paid Thompson any money earned from those dates, and that "she typically charges \$150 or \$200 for an hour." CP 389-90; 16RP 6-10, 99-104. Defense counsel noted that Pavlovich "indicat[ed]" "these are statements that would support promoting prostitution." 16RP 8-9.

The court noted the "gravamen" of admissibility would turn on whether Morrow's statements were trustworthy. 16RP 10. Thompson argued Morrow's statements were admissible against her penal interest because she was aware the statements could subject to her criminal liability based upon her prior convictions for prostitution. 16RP 99-100.

The prosecutor responded that Morrow's statements of "no" in response to Pavlovich's questions of whether Thompson set up dates for her and whether he received any money were not against her penal interest. The State acknowledged, however, that Morrow's statements detailing how much she charges for prostitution were against her penal

interest. Supp. CP ____ (sub no. 140, State's Memorandum on Statement Against Interest, at 1-2); 16RP 100-01. The prosecutor also argued Morrow's statements did not satisfy the State v. Ryan,³ factors to establish adequate indicia of reliability and trustworthiness. Supp. CP ____ (sub no. 140, State's Memorandum on Statement Against Interest, at 1-2); 16RP 101-02.

The court concluded, "I think that the rule only applies to the statement against the defendant's interests, and I don't find the first two statements to be against Mr. Thompson's interests." 16RP 102. The court found Morrow's statement about how much she charges was against her penal interest, but concluded, "I'm not going to permit cross-examination on these questions." 16RP 103.

Defense counsel sought clarification of the trial court's ruling, explaining Morrow's statements were being offered against her own penal interest, not Thompson's. 16RP 103-04. The court questioned whether Morrow's penal interest was at issue and whether it mattered that she was not a co-defendant. 16RP 103. Defense counsel maintained Morrow's statements were against her penal interest because they were an admission of illegal activity. 16RP 104.

³ 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).

The trial court excluded Morrow's statements concluding, "I'm not persuaded that it's against the defendant's penal interest," and "I don't find it trustworthy[.]" 16RP 104. The trial court did not find any of the Ryan factors were not satisfied.

C. ARGUMENT

THE COURT ERRED IN EXCLUDING MORROW'S STATEMENTS TO POLICE.

1. The Trial Court Erred in Excluding Morrow's Statements to Police Offered as a Statement Against Penal Interest.

ER 804 (b)(3) allows admission of prior statements of a witness when they expose the declarant to civil or criminal liability. Statements are admissible at trial if: (1) the declarant is unavailable to testify, (2) the statements so far tend to expose the declarant to criminal liability that a reasonable person in the same position would not have made the statement unless convinced of its truth, and (3) corroborating circumstances clearly indicate the trustworthiness of the statement. State v. Whelchel, 115 Wn.2d 708, 715-16, 801 P.2d 948 (1990); State v. St. Pierre, 111 Wn.2d 105, 117, 759 P.2d 383 (1988). Where the defense offers a statement against a declarant's penal interest, "the presumption is admissibility and not exclusion." State v. Roberts, 142 Wn.2d 471, 497, 14 P.3d 713 (2000). This Court reviews the admission of evidence under ER 804(b)(3) for abuse

of discretion. State v. Massey, 60 Wn. App. 131, 143, 803 P.2d 340 (1990), rev. denied, 115 Wn.2d 1021, cert. denied, 111 S. Ct. 1584 (1991).

There was no dispute Morrow was unavailable. Neither party could secure Morrow's presence for trial despite multiple attempts. 2RP 27, 45-46; 8RP 20; 17RP 72; CP 391-93. See State v. Sweeney, 45 Wn. App. 81, 723 P.2d 551 (1986) (a witness is unavailable when the state makes a good faith effort to obtain the presence of the witness using the means available to compel the witnesses' attendance).

Morrow also would not likely make that statement unless true because of the exposure to criminal liability. "Statements against penal interest are intrinsically reliable because a person is unlikely to make a self-incriminating admission unless it is true." State v. Chenoweth, 160 Wn.2d 454, 483, 158 P.3d 595 (2007). During her interview, Morrow admitted to participating in prostitution, detailed how much she charged, and denied that Thompson influenced, or benefited in any way from her prostituting. The court properly concluded Morrow's statement about her hourly rate was against penal interest. 16RP 103-04.

The Court concluded however, that Morrow's other statements denying Thompson's involvement were not statements against Thompson's penal interest and therefore not admissible. 16RP 102-04. In so ruling, the court misunderstood the requirements of ER 804(b)(3). As defense counsel

explained, Morrow's statements were being offered as statements against her own penal interest, not Thompson's. 16RP 104. The rule clearly provides that "a statement against interest is admissible against any party." K. Tegland, 5A Wash. Pract., Evidence, § 804.30, at 209 (5th Ed. 2007). Indeed, statements against penal interest are often offered in the same manner as Thompson did here: to show that someone other than the defendant committed the charged crime. Id. at 208.

State v. Jordan,⁴ is instructive in this regard. During his trial for kidnapping and felony murder, Jordan sought to introduce evidence through a defense witness that Margarito Ramirez had admitted kidnapping and killing the victim. The trial court excluded Ramirez's statement, determining it did not meet the criteria of a valid hearsay exception. Jordan, 106 Wn. App. at 299. The trial court concluded a "braggadocios statement" by Ramirez to another gang member did not subject Ramirez to any threat of criminal prosecution. Jordan, 106 Wn. App. at 300.

The Court of Appeals disagreed. Citing the "presumption of admissibility," the Court concluded the trial court abused its discretion by excluding Ramirez's statements as against penal interest despite finding other factors supporting admissibility were "fairly evenly balanced."

⁴ 106 Wn. App. 291, 23 P.3d 1100, rev. denied, 145 Wn.2d 1013 (2001).

Jordan, 106 Wn. App. at 300-02. The Court noted Ramirez was convicted of similar charges before Jordan's trial. Jordan, 106 Wn. App. at 300.

Like, Jordan, here the presumption of admissibility favored admitting Morrow's statements. Morrow's statements amounted to a confession of engaging in prostitution. By also denying Thompson's involvement, Morrow took full responsibility for her actions, thereby diminishing any possible defense to prostitution such as duress caused by Thompson's alleged control over her.

Morrow also knew her statements exposed her to criminal liability. At the time of the statements, Morrow had outstanding warrants and prior convictions for prostitution. 2RP 45; 16RP 99-100; 17RP 9, 25-26. She therefore knew any statements acknowledging further involvement in prostitution could result in additional charges and convictions. 16RP 99-100. Moreover, Morrow also had a prior conviction for making a false statement to a public servant. 16RP 101. She therefore knew the risk associated with making false statements to police. Yet, Morrow told police during the interview that "everything that I've told you is the truth." Supp. CP ___ (sub no. 140, State's Memorandum on Statement Against Interest, at 23). Morrow's statement to police was therefore against her penal interest.

As a result, the determinative analysis is whether Morrow's statement was reliable and trustworthy. In making that determination, Washington courts apply a nine-part test:

- (1) whether there is an apparent motive to lie;
- (2) the general character of the declarant;
- (3) whether more than one person heard the statements;
- (4) whether the statements were made spontaneously;
- (5) the timing of the declaration and the relationship between the declarant and the witness;
- (6) whether the statements contain assertions of past fact;
- (7) whether cross-examination could not show the declarant's lack of knowledge;
- (8) whether the possibility of the declarant's faulty recollection is remote; and
- (9) whether the circumstances surrounding the statement are such that there is no reason to suppose the declarant misrepresented the defendant's involvement.

Ryan, 103 Wn.2d at, 175-76. It is not necessary that all of the indicia of reliability be present; rather, the court must be satisfied after weighing the various factors that the balance weighs in favor of reliability. State v. Anderson, 107 Wn.2d 745, 753, 733 P.2d 517 (1987); State v. Hutcheson, 62 Wn. App. 282, 292-93, 813 P.2d 1283 (1991), rev. denied, 118 Wn.2d 1020 (1992).

Significantly, although concluding Morrow's statements were "untrustworthy," the trial court did not find any of the Ryan factors were not satisfied. 16RP 104. Application of the factors demonstrates the statement also bears sufficient indicia of trustworthiness to merit admission.

First, although the State argued Morrow's "affinity" for Thompson demonstrated her motive to lie for him, as indicated above, Morrow knowingly exposed herself to criminal liability when she admitted to engaging in prostitution. 16RP 101; Supp. CP ___ (sub no. 140, State's Memorandum on Statement Against Interest, at 2). Morrow therefore had a great deal to lose by giving the statement to police. This factor weighs in favor of the admission of testimony concerning her statements.

Second, although Morrow has prior convictions for prostitution and making a false statement, she never changed her story about engaging in prostitution on her own. Therefore, this second factor cuts in favor of Morrow's trustworthiness.

The third factor, whether more than one person heard the statements, also weighs in favor of its admissibility because Morrow gave the recorded statement to police.

The fourth factor, whether the statement was made spontaneously, also weighs in favor of its admission. Although Morrow's statements were made in response to police questioning they were nonetheless volunteered.

The State argued the fifth factor was not satisfied because Morrow was “very upset by the arrest of [Thompson] and the police investigation.” Supp. CP ___ (sub no. 140, State’s Memorandum on Statement Against Interest, at 3). This fact adds to its reliability rather than subtracting it. Morrow would of course be upset by the investigation: according to her, an innocent person had been arrested and charged.

Sixth, statements in the letter are not made from faulty memory. They are affirmative statements of the events as Morrow remembers based upon personal knowledge.

The seventh factor, whether cross-examination would show the declarant’s lack of knowledge, cannot be assessed without knowing what questions would have been asked on cross-examination had Morrow testified. The State however, did not dispute that Morrow had personal knowledge of the incidents. 16RP 102; Supp. CP ___ (sub no. 140, State’s Memorandum on Statement Against Interest, at 3).

Similarly, the prosecutor did not dispute that the eighth factor, acknowledging, “there is no concern of faulty recollection.” Supp. CP ___ (sub no. 140, State’s Memorandum on Statement Against Interest, at 3). This factor thus also weighs in favor of admission.

Lastly, whether the declarant likely misrepresented her involvement, neither favors nor disfavors its admissibility. The State argued that the

timing of Morrow's statement indicates "she had every reason to misrepresent the defendant's involvement in her prostitution activities." Supp. CP ___ (sub no. 140, State's Memorandum on Statement Against Interest, at 3). As the state acknowledged, however, there was no reason to doubt Morrow's recollection or personal knowledge of events.

The majority of the factors favors admissibility of Morrow's statement. Here, the trial court improperly found Morrow's statements untrustworthy without weighing the necessary factors. This decision, when combined with the "presumption of reliability," and the trial court's misunderstanding that ER 804(b)(3) did in fact permit introduction of Morrow's statement against her own penal interest, demonstrates the trial court abused its discretion when it excluded Morrow's statements. Reversal of Thompson's promoting prostitution conviction is therefore required.

2. Exclusion of Morrow's Statements Violated Thompson's Right to Present a Defense.

The trial court's evidentiary ruling also violated Thompson's state and federal constitutional rights to present a defense. The Sixth and Fourteenth Amendments, as well as article I, § 21⁵ of the Washington

⁵ Article 1, § 21 provides, "The right of trial by jury shall remain inviolate[.]"

Constitution, guarantee the right to trial by jury and to defend against the state's allegations. These guarantees provide criminal defendants a meaningful opportunity to present a complete defense, a fundamental element of due process. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). See also, State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983) (the right to put on a defense is also guaranteed by art. 1, § 22 of the Washington Constitution).

Absent a compelling justification, excluding exculpatory evidence deprives a defendant of the fundamental right to put the prosecutor's case to "the crucible of meaningful adversarial testing." Crane v. Kentucky, 476 U.S. 683, 689- 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (quoting United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)).

Rules regarding the admissibility of hearsay must be closely scrutinized to avoid infringing on the accused's constitutional right to present a defense. In Chambers, the Supreme Court held that exclusion of a hearsay confession to the crime by a third party, which bore sufficient indicia of trustworthiness, deprived defendant of constitutional due process. 410 U.S. at 302. The court stated:

That testimony was also crucial to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilty are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

Id.

The trial court's exclusion of Morrow's statements prevented Thompson from presenting evidence relevant to his defense; specifically that he did not promote, or benefit, from Morrow's prostitution. Even if this Court finds the trial court did not error by excluding Morrow's statements, Thompson's conviction must still be reversed because exclusion of the statements denied Thompson his right to present a defense.

3. The Error was Not Harmless.

The trial court's error was not harmless given the nature of the evidence and the defense theory of the case. An evidentiary error requires reversal if, within reasonable probability, the error materially affected the verdict. State v. Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). Furthermore, constitutional error is harmless only if there is no reasonable probability the verdict would have been different had the error not occurred. State v. Jones, 168 Wn.2d 713, 724, 230 P.3d 576 (2010).

A main issue at trial was whether Thompson promoted Morrow's participation in prostitution. The defense theory was that Thompson was not guilty because he did not participate in, or benefit from, Morrow's

prostitution. Morrow's statements against penal interest supported this theory because although Morrow admitted to participating in prostitution, she also denied that Thompson influenced, or benefited in any way, from her prostituting. Exclusion of Morrow's statements therefore eliminated evidence relevant to Thompson's defense. This abuse of discretion affected the fact-finding process and undermined Thompson's defense. Reversal of the conviction is required.

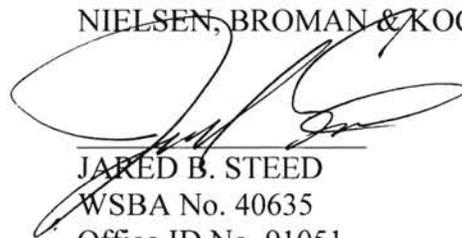
D. CONCLUSION

For the foregoing reasons, this Court should reverse Thompson's conviction and remand for a new trial.

DATED this 18th day of March, 2014.

Respectfully submitted,

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

STATE OF WASHINGTON)

Respondent,)

vs.)

ANTHONY THOMPSON,)

Appellant.)

COA NO. 70235-1-1

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18TH DAY OF MARCH, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ANTHONY THOMPSON
DOC NO. 860704
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SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF MARCH, 2014.

X Patrick Mayovsky

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