

73105-0

FILED  
June 26, 2015  
Court of Appeals  
Division I  
State of Washington

73105-0

NO. 73105-0-I

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

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STATE OF WASHINGTON,

Respondent,

v.

TODD PEREZ,

Appellant.

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

The Honorable Richard T. Okrent, Judge  
The Honorable Joseph P. Wilson, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying appellant's request to have prior convictions referred to by name rather than as "crime[s] of dishonesty."

2. The trial court's limiting instruction referring to appellant's prior convictions as "crime[s] of dishonesty" was an improper comment on the evidence. CP 51 (instruction 8).

2. The trial court erred in rejecting appellant's proposed jury instruction limiting the jury's use of appellant's prior criminal convictions.

Issues Pertaining to Assignments of Error

Appellant's prior convictions were admitted as impeachment evidence at trial. Over appellant's objection, the prior convictions were referred to as "crime[s] of dishonesty" during appellant's testimony and in the jury instructions.

1. Did the trial court error in denying appellant's request to have the prior convictions referred to by name rather than as "crime[s] of dishonesty," where naming prior convictions is the preferred method for introducing impeachment evidence?

2. Was the trial court's instruction an unconstitutional comment on the evidence because the characterization of appellant's prior

convictions as “crime[s] of dishonesty” permitted the jury to infer that the trial court believed appellant was dishonest and therefore not credible?

3. Did the trial court error in refusing appellant’s proposed limiting instruction where it was a proper statement of the law and allowed the State to receive all legitimate impeachment value from the prior convictions without the unfair prejudice associated with labeling the prior convictions as “crime[s] of dishonesty”?

B. STATEMENT OF THE CASE

1. Procedural History

The Snohomish County prosecutor charged appellant Todd Perez with one count of failing to register as a sex offender. CP 66-67. A jury found Perez guilty as charged. CP 39.

Perez was sentenced to 57 months in prison. The trial court also imposed 3 months of community custody. CP 17-30; 3RP<sup>1</sup> 11. Perez timely appeals. CP 2-16.

2. Trial Testimony

Perez registered as a sex offender at the Snohomish County Sheriff’s Office on May 12, 2014. 2RP 45-46, 76-77, 122. It was the first

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP – November 6, 2014; 2RP – December 8 & 9, 2-14; 3RP – February 3, 2015.

time Perez had registered as homeless rather than reporting a fixed address. 2RP 76-77, 119-22. Because of his registration status, Perez was told to report in person every Tuesday at the sheriff's office. 2RP 47, 50, 72-73. Perez reported at the sheriff's office again on May 13, 2014. 2RP 45-46, 76, 122.

Perez's mother drove him to the sheriff's office to register on May 20 and 27, 2014. 2RP 112-15. Perez was told he had to list a specific address for everywhere he slept. Perez explained that because it was too cold to sleep outside some nights, he did not have specific addresses to list. 2RP 124-25. Perez did not sign the registration forms on May 20 and 27, 2014. 2RP 84-85, 143.

Perez left Snohomish County after May 27 to attend school. 2RP 114, 117, 127-29. Perez explained he hitchhiked and stayed with his girlfriend from the end of May until July 5 or 6, 2014. 2RP 128-19, 136. Perez did not register in Snohomish County after May 27 because he did not believe he needed to change his address since he never stayed in one county for more than three days. 2RP 130, 138, 144. Perez explained that he was confused about the different registration requirements since he had recently changed his registration from a fixed address to homeless. No one explained the different registration requirements to Perez. 2RP 124,

126-27. Perez acknowledged signing the registration form which stated that he was required to appear in person every Tuesday. 2RP 135.

Perez was arrested in July 2014. 1RP 7. On August 26, 2014 Marysville police officer Craig Bartl interviewed Perez. 2RP 107. Perez told Bartl that he had an alcohol abuse issues and did not know where he was between May 20 and July 6, 2014. 2RP 108-09. Bartl explained that Perez asked him to overlook his failure to register. 2RP 109.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN REFUSING PEREZ'S REQUEST TO NAME PRIOR IMPEACHMENT CONVICTIONS.

The State sought to impeach Perez's testimony with four prior convictions.<sup>2</sup> 2RP 6. Perez objected to the State referring to the convictions as crimes of dishonesty, instead requesting the convictions be referred to by name. 2RP 94-95, 97. The trial court denied Perez's request, reasoning the jury was entitled to know the convictions were crimes of dishonesty and were relevant to Perez's credibility. 2RP 98-99, 120. The trial court erred in denying Perez's request.

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<sup>2</sup> The prior convictions included one count each of second degree robbery, first degree possession of stolen property, third degree theft, and making a false statement. 2RP 6-7.

Under ER 609(a)(2),<sup>3</sup> a felony conviction involving dishonesty or a false statement is admissible to impeach a witness. Evidence of prior conviction under ER 609 is admitted for the purpose of impeachment only, and an instruction cautioning the jury to limit its consideration to its intended purpose is both proper and necessary. State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985). The only purpose of admitting evidence of prior convictions under ER 609 is to aid the trier of fact in assessing the truth of a witness's testimony. State v. Alexis, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980). Rulings made under ER 609 are reviewed for an abuse of discretion. State v. Rivers, 129 Wn.2d 697, 704-05, 921 P.2d 495 (1996).

Washington courts have recognized that it is the nature of the prior felony which renders it probative of veracity. State v. Hardy, 133 Wn.2d 701, 712, 946 P.2d 1175 (1997). Trial courts should therefore not admit unnamed felonies under ER 609(a)(2). Id.; State v. Teal, 117 Wn. App.

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<sup>3</sup> ER 609(a)(2) provides in relevant part:

For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime . . . (2) involved dishonesty or false statement, regardless of the punishment.

831, 844, 73 P.3d 402 (2003), aff'd on other grounds, 152 Wn.2d 333, 96 P.3d 974 (2004).

Perez's request that the prior convictions be referred to by name rather than as "crime[s] of dishonesty" is the preferred method for introducing impeachment evidence under ER 609(a)(2). Hardy, 133 Wn.2d at 712. It was also a proper strategic decision. See State v. King, 75 Wn. App. 899, 909, 878 P.2d 466 (1994) ("Some defendants may perceive that withholding the nature of the felony from the jury will lessen the prejudice, particularly where the prior felony is similar to the current charge. Other defendants may prefer that the felony be named so that the jury does not speculate that the prior conviction is something even worse."), rev. denied, 125 Wn.2d 1021 (1995); State v. Gomez, 75 Wn. App. 648, 655 n. 10, 880 P.2d 65 (1994) "[T]here are circumstances in which counsel may decide that jury speculation about the nature of the prior conviction is more prejudicial than naming the crime."). The trial court abused its discretion in denying Perez's request.

The error was prejudicial. Perez explained that he did not understand the different requirements after he changed his registration from a fixed address to homeless because it was never explained to him. 2RP 124-27. Thus, Perez's testimony was crucial to his defense that he did not knowingly fail to comply with the requirements of sex offender

registration. 2RP 153, 160-62. Although Perez's testimony was not unimpeached, the jury should have been allowed to make its credibility determinations free from the unfair prejudice arising from the labeling of his prior convictions as "crime[s] of dishonesty." See argument two, infra; See also State v. Hardy, 133 Wn.2d 701, 713-14, 946 P.2d 1175 (1997) (reversal required where credibility was central to case and only impeachment of Hardy's veracity was introduction of prior convictions). This court should reverse Perez's conviction and remand for a new trial.

2. THE JURY INSTRUCTION COMMENTED ON THE EVIDENCE BY REFERRING TO PEREZ'S PRIOR CONVICTIONS AS 'CRIME[S] OF DISHONESTY.'

Article 4, section 16 of the Washington Constitution provides: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." This provision prohibits a judge from instructing the jury "that matters of fact have been established as a matter of law." State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997) (citing, State v. Primrose, 32 Wn. App. 1, 3, 6, 645 P.2d 714 (1982)).

The prohibition is strictly applied. Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971). "All remarks and observations as to the facts before the jury are positively prohibited." State v. Francisco, 148 Wn. App. 168, 179, 199 P.3d 478, (quoting State v. Bogner, 62 Wn.2d

247, 252, 382 P.2d 254 (1963)), rev. denied, 166 Wn.2d 1027 (2009). But a comment on the evidence is especially problematic when it conveys an opinion regarding the truth or falsity of evidence produced at trial or relieves the prosecution of its burden of proof. State v. McDonald, 70 Wn.2d 328, 330, 422 P.2d 838 (1967) (instruction that evidence was presented of escape assumed fact of escape as true and was prohibited comment on the evidence); Primrose, 32 Wn. App. at 2-4 (instruction that defendant had produced no evidence of lawful excuse for failure to appear was tantamount to directed verdict)).

Judicial comments on the evidence are manifest constitutional errors that may be raised for the first time on appeal. State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006). Errors in jury instructions are reviewed de novo. Id. at 721.

Here, over defense counsel's objection, the trial court instructed the jury that Perez's prior convictions were "crime[s] of dishonesty." CP 51 (instruction 8); 2RP 102-03. The instruction was an unconstitutional comment on the evidence because it conveyed to the jury that the judge believed Perez was dishonest and therefore not credible. State v. Dewey,<sup>4</sup> is instructive in this regard. Dewey was charged with third degree rape

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<sup>4</sup> 93 Wn. App. 50, 966 P.2d 414 (1998), abrogated on other grounds by State v. DeVincentis, 150 Wn. 2d 11, 74 P.3d 119 (2003).

against K.B. and contended the sexual intercourse was consensual. 93 Wn. App. at 52. The trial court granted the State's motion to present evidence from an earlier rape case involving A.N.R. for the limited purposes of determining whether the incident with K.B. was consensual and whether it was part of a common scheme or plan. Dewey, 93 Wn. App. at 53. Just before A.N.R. took the stand, the trial judge read a defense-proposed limiting instruction. Id. at 54. But at the conclusion of the evidence, the court used the State's instruction, which referred to the prior incident as a "rape." Id. at 54.

On appeal, the court agreed the concluding instruction was an unconstitutional comment indicating the judge believed A.N.R. was telling the truth. Id. at 58. The court explained, "[t]he 'incident' would only become a 'rape' if A.N.R.'s testimony were believed." Id. at 59. Therefore, the instruction permitted the jury to infer the trial court believed A.N.R.'s testimony was true. Id. The court reversed Dewey's conviction. Id.

Similarly, here the characterization of Perez's prior convictions as "crime[s] of dishonesty," permitted the jury to infer that the trial court believed Perez was dishonest and therefore not credible. The court should have used a more neutral term in this case, rather than giving an instruction that described Perez's prior convictions as dishonest. Indeed,

the standard ER 609 limiting instruction does not reference “crimes of dishonesty,” instead providing, “you may consider evidence that the defendant has been convicted of *a crime* only in deciding what weight or credibility to give to the defendant’s testimony, and for no other purpose.” WPIC 5.05<sup>5</sup> (emphasis added). See State v. Davenport, 33 Wn. App. 704, 707, 657 P.2d 794 (1983) (ER 609 instruction limiting jury’s consideration of defendant’s conviction for *a crime* not an unconstitutional comment on the evidence because it conveyed neither the court’s attitude regarding the merits of the case nor the court’s personal evaluation of witness credibility), reversed on other grounds, 100 Wn.2d 757, 675 P.2d 1213 (1984) (emphasis added).

Judicial comments on the evidence are presumed prejudicial. Levy, 156 Wn.2d at 725. This presumption exists because the very purpose of prohibiting judicial comments is to prevent the trial judge’s opinion from influencing the jury. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). Reversal is mandated unless the record affirmatively shows no prejudice could have resulted. State v. Jackman, 156 Wn.2d 736, 745, 132 P.3d 136 (2007) (reversible error where court’s

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<sup>5</sup> 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 5.05 (3d ed. 2008).

instructions referenced victims' birth dates, an uncontested but critical element of the crime).

The jury was properly instructed that the trial judge is prohibited from conveying his personal opinion as to the truth or falsity of any evidence. CP 44 (instruction 1). But the jury was also instructed that it must apply the law from the instructions given by the trial court. CP 42 (instruction 1). Nothing in the instructions told the jury it was not permitted to infer from the trial court's comment about dishonesty that Perez was not to be believed.

Even if it had been instructed to do so, it is unlikely the jury would be able to follow such an instruction. The Supreme Court has explained, "the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues." Lane, 125 Wn.2d at 838 (quoting State v. Crotts, 22 Wash. 245, 250-51, 60 P. 403 (1900)).

Perez's testimony was crucial to his defense. See argument one, supra. The trial court's instruction impermissibly undercut Perez's testimony and his theory of the case by conferring to the jury that the trial court thought Perez should not be believed. This Court should conclude

the trial court's impermissible comment on the evidence affected the jury's verdict and reverse.

3. THE TRIAL COURT ERRED IN REFUSING PEREZ'S PROPOSED ER 609 LIMITING INSTRUCTION.

Perez objected to the trial court's instruction which described the prior convictions as "crime[s] of dishonesty." CP 51 (instruction 8); 2RP 102-03. Instead, defense counsel proposed a "more neutral" limiting instruction which stated, "you may consider evidence that the defendant has been convicted of a non-sex offense crime only in deciding what weight or credibility to give to the defendant's testimony, and for no other purpose." 2RP 102-03; Supp. CP \_\_\_\_ (sub no. 19, Defendant's Proposed Jury Instructions, filed 12/8/14, at 3). The trial court erred by refusing to give defense counsel's proposed instruction.

Washington courts recognize the unfair prejudice that occurs by admission of prior convictions for impeachment purposes under ER 609(a)(2). See State v. Newton, 109 Wn.2d 69, 75, 743 P.2d 254 (1987) (recognizing that since the adoption of ER 609, "we have consistently and emphatically expressed our recognition of its extraordinary potential for misleading and confusing a jury."). Therefore, courts legitimately sanitize prior convictions to avoid such unfair prejudice. See e.g., State v. Smith, 67 Wn. App. 81, 89-90, 834 P.2d 26 (1992) (court noted with approval

that the trial court had minimized any potential prejudice by having the prosecutor refer to the prior convictions as simply “felony” convictions, rather than as burglary convictions), aff’d, 123 Wn.2d 51, 864 P.2d 1371 (1993); State v. Friederick, 34 Wn. App. 537, 543, 663 P.2d 122 (1983) (in prosecution for robbery and kidnapping, trial court properly admitted prior convictions for rape and kidnapping so long as the prosecution did not identify the nature of the crimes).

Perez’s proposed instruction mirrored the language of WPIC 5.05 and was a proper statement of the law. The proposed instruction was also properly tailored to differentiate between the prior sex offense conviction admitted as an element of Perez’s current charge and the different prior convictions admitted for impeachment purposes. State v. Ortega, 134 Wn. App. 617, 622-23, 142 P.3d 175 (2006) (encouraging the use of a tailored instruction under these circumstances), rev. denied, 160 Wn.2d 1016 (2007). Thus, Perez’s proposed jury instruction allowed the State to receive all legitimate impeachment value from the prior convictions, without the unfair prejudice associated with labeling the prior convictions as “crime[s] of dishonesty.” Because the error prejudiced Perez for the reasons discussed in arguments one and two, supra, this court should reverse Perez’s conviction and remand for a new trial.

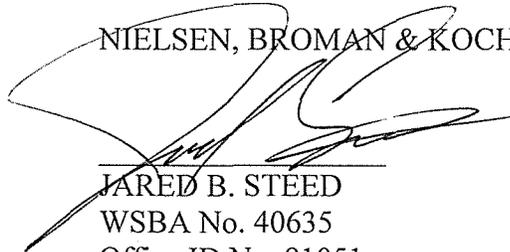
D. CONCLUSION

For the reasons discussed above, this Court should reverse Perez's conviction and remand for a new trial.

DATED this 26<sup>th</sup> day of June, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A large, stylized handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over a horizontal line.

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DIVISION ONE

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 73105-0-1
	)	
TODD PEREZ,	)	
	)	
Appellant.	)	

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**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 26<sup>TH</sup> DAY OF JUNE 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] TODD PEREZ  
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MONROE, WA 98272

**SIGNED** IN SEATTLE WASHINGTON, THIS 26<sup>TH</sup> DAY OF JUNE 2015.

X *Patrick Mayovsky*