

No. 45694-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Shawn Christopher,

Appellant.

Clark County Superior Court Cause No. 13-1-01577-3

The Honorable Judge Robert A. Lewis

Appellant's Reply Brief

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ARGUMENT

I. MR. CHRISTOPHER WAS CONVICTED UNDER A STATUTE ENACTED IN VIOLATION OF WASH. CONST. ART. II, § 19.

Appellant rests on the argument set forth in the Opening Brief.

II. THE PROSECUTOR COMMITTED MISCONDUCT THAT VIOLATED MR. CHRISTOPHER'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BY IMPROPERLY EXPOSING THE JURY TO PROPENSITY EVIDENCE.

The trial court ruled *in limine* that the state would not be permitted to introduce any of Mr. Christopher's prior convictions or evidence of prior bad acts. RP 25-26, 27, 30, 56; CP 18-38. Despite this, the prosecutor asked Officer Bibens if he knew Mr. Christopher, eliciting the response "I've met Shawn before on some previous calls at that same location." RP 234.

The state appears to agree that this was misconduct. See Response Brief, page 15-16.

This agreed misconduct warrants reversal because of its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). The inquiry examines the misconduct and its impact, not the evidence that was properly admitted. *In re Glasmann*, 175 Wn.2d 696, 711, 286 P.3d 673 (2012).

Since propensity evidence is by its very nature highly prejudicial, it also can violate due process by rendering a trial unfair, which it did here. U.S. Const. Amend. XIV; *Garceau v. Woodford*, 275 F.3d 769, 775 (9th Cir. 2001), *reversed on other grounds at* 538 U.S. 202, 123 S.Ct. 1398, 155 L.Ed.2d 363 (2003); *see also McKinney v. Rees*, 993 F.2d 1378 (9th Cir. 1993); *Garceau*, 275 F.3d at 776, 777-778; *see also Old Chief v. United States*, 519 U.S. 172, 182, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997).

It also violated the rules of evidence. ER 404(b); ER 403; *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

The state argues that since the misconduct only occurred once and was not repeated, it did not prejudice the trial. Response Brief, p. 17. But the officer's testimony left jurors with the impression that Mr. Christopher had previously committed acts of domestic violence against Ms. Gutierrez. Defense attempts to add information on the topic and mitigate its impact do not render the misconduct harmless.

As argued earlier, the court's instruction to disregard the officer's remark likely had little impact. Jurors may have unconsciously used propensity as evidence of guilt. In addition, since the case was a credibility

contest¹, jurors were likely to have used propensity evidence to presume guilt.

The evidence was hotly contested, and Gutierrez admitted she suffered from memory problems. RP 170. Gutierrez also acknowledged that she was not bruised from the claimed kick of Mr. Christopher, that her neck was marked with a hickey when the officer saw her, and that her eyes were always red. RP 181, 189-190, 191-195.

The trial court should have granted Mr. Christopher's mistrial motion, or granted a new trial. RP 235-238; CP 76-79.

The prosecutor committed prejudicial misconduct. There is a substantial likelihood the misconduct affected the verdict. *State v. Lindsay*, 180 Wn.2d 423, 326 P.3d 125 (2014). In addition, jurors used propensity evidence to convict Mr. Christopher. This violated his right to due process. *Garceau*, 275 F.3d at 776, 777-778. His convictions must be reversed and the case remanded for a new trial.

III. THE COURT ERRED BY ORDERING MR. CHRISTOPHER TO PAY ATTORNEY FEES.

Appellant rests on the argument in the Opening Brief.

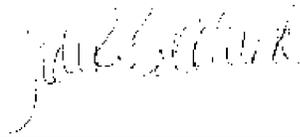
¹ The state argues in their Response Brief that the case was not a credibility contest. But a review of the state's closing argument reveals that the prosecutor told the jury "this really is about credibility", and mentioned "credibility" multiple times in rebuttal closing argument. RP 419.

CONCLUSION

Mr. Christopher's assault conviction must be vacated and the charge dismissed, or in the alternative, remanded for retrial. In the alternative, if the convictions are not reversed, the order imposing attorney fees and defense costs must be vacated.

Respectfully submitted on September 25, 2014.

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Shawn Christopher, DOC #326843
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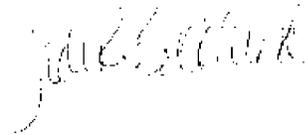
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 25, 2014.



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BACKLUND & MISTRY

September 25, 2014 - 3:51 PM

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