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April 29, 2015
Court of Appeals
Division I NO. 72263-8-1
State of Washington

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

STATE OF WASHINGTON,

Appellant,

v.

SAYIDIN H. MOHAMED,

Respondent.

REPLY BRIEF OF APPELLANT

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I. ARGUMENT IN REPLY

A. WHEN A STATEMENT IS ADMITTED WITHOUT LIMITATION, IT IS ADMITTED FOR THE TRUTH OF THE MATTERS STATED.

The defendant acknowledges that, under ER 806, he could be impeached with his prior convictions if his statements were admitted for the truth of the matters asserted. Brief of Respondent at 12-13. He also acknowledges that no instruction was given limiting the jury's consideration of his statements. Brief of Respondent at 15-16. He nonetheless argues that because the *judge* purportedly believed that the statements were admitted for a limited purpose, ER 806 does not apply. This argument is contrary to both the policy of the rule and case law.

The policy underlying ER 806 has been explained by the Seventh Circuit Court of Appeals:

[A] witness can be impeached by evidence of a previous conviction. When the witness's "testimony" consists of her out-of-court declaration that is admissible under an exception to the hearsay rule, the conviction can still be used to impeach that "testimony" in the course of cross-examination of the witness who is testifying to the out-of-court declaration. But impeachment of an out-of-court declarant with a prior conviction, or anything else, is inappropriate, in fact impossible, if the credibility of the out-of-court declarant is not at issue (so that there is nothing to impeach), which is to say if the declaration is not being placed in evidence for its truth value.

United States v. Stefonek, 179 F.3d 1030, 1036 (7th Cir. 1999)
(citations omitted) (discussing Fed. R. Ev. 806).

Application of this rule thus turns on whether the jurors were called on to assess the truth of the declarant's statement. If they were, impeachment was necessary to allow an intelligent assessment of the declarant's credibility. If they were not called on to make that assessment, impeachment was irrelevant.

This determination, in turn, depends on what use the jury was allowed to make of the declarant's statement. The Seventh Circuit pointed this out in United States v. Burton, 937 F.2d 324 (7th Cir. 1991). There, police recorded an incriminating conversation between the defendants and an informant. This recording was admitted into evidence without limitation. The defendants sought to impeach the informant with his prior conviction. The trial court refused to allow this impeachment.

On appeal, the government argued that the informant's statements were not admitted for their truth, but "merely to provide context to the conversations in which these defendants participated." Id. at 327. The court rejected this argument:

In the absence of any limiting instruction directing the jurors to use [the informant's] statements only to put [the defendants'] statements in context, [the

informant's] statements must be taken as hearsay testimony admitted against defendants which they had a right to impeach.... The jurors were free to take [the informant's] statements as substantive evidence rather than as mere filler. Once [the informant's] statements were admitted without qualification, the defendants had a right to impeach his credibility.

Because of this, the defendants should have been allowed to impeach the informant under Fed. R. Ev. 806. Burton, 937 F.2d at 327-28. (Since the evidence against the defendants was overwhelming, the error in denying the impeachment was harmless. Id. at 330.)

The Nevada Supreme Court applied the same reasoning in State v. Morrow, 273 Neb. 492, 731 N.W.2d 558 (2007). The defendant there was charged with possessing drugs that were found in his car. The State introduced statements from the defendant's passengers, who denied possession of the drugs. The defendant sought to impeach one of the passengers with an inconsistent statement. The trial court refused to allow this impeachment.

On appeal, the State argued that the passenger's statement was admitted for non-hearsay purposes. The court rejected this argument:

Even if the State's purported nonhearsay purposes for introducing [the passenger's] statement of denial were relevant and supported by the record, we note that no instruction was given limiting the statement's use by the jury. In order for the State's nonhearsay argument to prevail, an instruction limiting [the passenger's] statement to the nonhearsay purpose was required.

The exclusion of the impeaching evidence therefore violated the Nevada equivalent of ER 806 (Nev. Rev. Stat § 27-806). Morrow, 273 Nev. at 599-600, 731 N.W.2d at 564-65.

The only case that the defendant cites to the contrary is this court's opinion in State v. Liu, 153 Wn. App. 304, 221 P.3d 948 (2009), aff'd on other grounds, 179 Wn.2d 457, 315 P.3d 493 (2014). In that case, experts testified to statements that formed part of the basis for their opinion. The issue on appeal was whether the admission of those statements violated the Confrontation Clause. This court held that they did not. The Supreme Court affirmed, but on substantially different reasoning.

The defendant in Liu did not raise any challenge based on evidence rules. Id. at 321 n. 18. This court noted that the Confrontation Clause issue is distinct from any such challenge. Id. at 322 ¶ 29. The court nonetheless remarked that the facts underlying the experts' opinions were admissible under ER 703 and

705. Liu, 153 Wn. App. at 321 ¶ 28. A limiting instruction may have been available, but the parties did not request one. Id. n. 18.

This court's dictum in Liu dicta has little if any bearing on the present case. The issue here is not whether the defendant's statements were admissible, but whether they were admitted for the truth of the matter asserted. Liu sheds no light on that point. Because there was no limiting instruction, the answer is clearly "yes."

Furthermore, as pointed out in the Brief of Appellant, this case involved more than a mere lack of a limiting instruction. Rather, the judge affirmatively told the jurors that they could "decide what weight or credibility to give to the defendant's statements." CP 94, inst. No. 4. As a result, the jurors were affirmatively allowed to treat the defendant's statements as credible. None of the cases cited by the defendant mention any similar instruction. Especially in light of this instruction, there is no basis for this court to conclude that those statements were not admitted for their truth.

As Stefonek points out, impeachment under ER 806 is permissible unless "the credibility of the out-of-court declarant is not at issue." Stefonek, 179 F.3d at 1036. Here, the expert testified that the validity of his conclusions depended on the accuracy of the

defendant's statements. 7/1 RP 68. The defendant's credibility was therefore in issue, and the impeachment was proper.

B. WHEN A PERSON'S STATEMENTS ARE INTRODUCED FOR THEIR TRUTH, THAT PERSON'S CRIMES OF DISHONESTY ARE AUTOMATICALLY CONSIDERED MORE PROBATIVE THAN PREJUDICIAL.

The defendant claims that admitting his prior convictions would have been overly prejudicial. This argument as well is contrary to the policy of the evidence rules. Under ER 609(a)(2), a prior conviction for a crime of dishonesty is automatically admissible for impeachment if it is less than 10 years old. The court does not engage in any balancing of probative value against prejudicial effect. State v. Brown, 113 Wn.2d 520, 553, 782 P.2d 1013 (1989) (plurality op.); see State v. Ray, 116 Wn.2d 531, 544, 806 P.2d 1220 (1991). This rule reflects society's interest in evaluating the credibility of defendants with criminal convictions affecting their credibility. Brown, 113 Wn.2d at 553-54. In effect, ER 609(a)(2) treats such convictions as so highly probative of credibility that the jury should be allowed to consider them, notwithstanding their potential prejudicial effect.

The need for such impeachment was particularly acute in the present case, since the jury had little other basis for assessing the

defendant's credibility. Because the defendant did not testify, the tools of cross-examination were unavailable. The prosecutor could not even comment on the defendant's failure to testify. State v. Ramirez, 49 Wn. App. 332, 336, 742 P.2d 726 (1987). Although the defense expert could be cross-examined, that would shed no light on the defendant's credibility, because the expert had not attempted to judge the truth of the defendant's statements. 7/1 RP 68.

Of course, the prosecutor could have argued that the defendant had a motive to fabricate his statements. The same, however, could be said of any other defendant. Such an argument would provide no way for the jury to assess whether this defendant was any more or less credible than any other defendant.

The defendant suggests that the prosecutor could have asked that the expert testify only "concerning his examination of the defendant without relating specifically those things which could bring in hearsay." Brief of Respondent at 20, quoting State v. Fullen, 7 Wn. App. 369, 381, 499 P.2d 893 (1972). The problem is that the expert did not *conduct* any examination. He simply reviewed police reports and talked to the defendant on the phone. 7/1 RP 50-51, 63. *All* the information he had about this case was

hearsay. The court could not have precluded the expert from relying on the defendant's statements. State v. Eaton, 30 Wn. App. 288, 293-95, 633 P.2d 921 (1981). If the hearsay was excluded, the jury would hear only the expert's conclusions. To conduct any meaningful cross-examination, the prosecutor needed to explore the basis for those conclusions. The "solution" of limiting the expert's testimony would be no solution at all.

As the expert acknowledged, his conclusions depended on the accuracy of the information on which he relied. 7/1 RP 69. To determine the value of the expert's opinion, the jury needed to assess the veracity of the person who provided that information. Prior convictions for crimes of dishonesty are probative of veracity. Under ER 806 and 609(a)(2), the State was entitled to introduce those convictions to impeach the defendant's statements. During the trial, the court properly allowed this impeachment. The court erred in using that correct ruling as the basis for granting a new trial.


II. CONCLUSION

The order granting a new trial should be reversed.

Respectfully submitted on April 29, 2015.

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DECLARATION OF DOCUMENT
FILING AND E-SERVICE


AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 29th day of April, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

REPLY BRIEF OF APPELLANT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Washington Appellate Project, maureen@washapp.org; wapofficemail@washapp.org; I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 29th day of April, 2015, at the Snohomish County Office.



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