NO. 46212-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

GREGORY BONDS,

Appellant.

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

The Honorable John R. Hickman, Judge

BRIEF OF APPELLANT

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1. The trial court violated appellant's constitutional right of confrontation by admitting testimonial statements of a non-testifying witness.

2. The trial court violated appellant's constitutional rights to due process and to compel witnesses when it precluded the defense from calling a material witness.

Issues pertaining to assignments of error

1. Appellant was convicted of assault, violation of a protection order, felony harassment, and witness tampering, arising out of an incident with his ex-wife. The alleged victim made statements to police at the time of the incident, but she died a month later, and she was never subject to cross examination. Where the statements were made primarily to provide information about past events and there was no ongoing emergency, did admission of the statements at trial violate appellant's constitutional right of confrontation?

2. Did the trial court violate appellant's constitutional rights to due process and to present witnesses in his defense when it prevented a defense witness from testifying after the witness violated the court's ruling excluding witnesses from the courtroom?

B. STATEMENT OF THE CASE

1. Procedural History

On June 3, 2013, the Pierce County Prosecuting Attorney charged appellant Gregory Bonds with first degree burglary, violation of a protection order, and felony harassment arising out of an incident on May 19, 2013. CP 1-3. The State added charges of tampering with a witness based on subsequent intercepted telephone calls from the Pierce County Jail. CP 4-7, 10-14, 144-47. The case proceeded to jury trial before the Honorable John R. Hickman. The jury did not find Bonds guilty of burglary but instead entered a guilty verdict on the lesser offense of fourth degree assault. CP 155-56. It entered guilty verdicts on the remaining counts. CP 157-61.

The court imposed an exceptional sentence based on the aggravating factor in RCW 9.94A.535(2)(c). CP 230, 233. It entered findings of fact and conclusions of law in support of the exceptional sentence. CP 288. Bonds filed this timely appeal. CP 267.

2. Substantive Facts

A no contact order issued as the result of previous conviction for a crime of harassment prohibited Gregory Bonds from contacting his ex-wife, Antoinette Weekly, who was also known and Antoinette Bonds and

Antoinette Jordan. 16RP[1] 489-90, 499; 17RP 742; CP 205-07. Despite that order, Bonds had contact with Antoinette[2] on May 19, 2013. 17RP 765. Antionette's daughter, Veatrice Jordan, called 911 and reported that Bonds was at the house. 16RP 511. While Veatrice[3] was on the phone, Antoinette went upstairs. 16RP 558.

When police arrived, they found Veatrice and two teenage boys downstairs. 17RP 707-08. Veatrice told them there was no one else in the house. 17RP 707-08, 710. When they cleared the upstairs, however, police found Antoinette hiding in a closet, and they brought her downstairs. 17RP 711. Bonds had left before the police arrived, and no one else was present. 15RP 450.

The police took a statement from Veatrice. 17RP 707. They also spoke to the two boys, who identified themselves as Damarcus Tate and Marcus Mayers. 17RP 709. Mayers was actually Treyvion Tucker, Bonds' grandson. 15RP 450; 16RP 502, 638. Both boys had been present during the incident that Veatrice reported to police. 15RP 451; 16RP 515.

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[1] The verbatim report of proceedings is contained in 20 volumes, designated as follows: 1RP—8/16/13; 2RP—11/5/13; 3RP—12/16/13; 4RP—12/17/13; 5RP—2/7/14; 6RP—2/11/14; 7RP—2/26/14; 8RP—2/27/14; 9RP—3/3/14; 10RP—3/4/14 (a.m.); 11RP—3/4/14 (p.m.); 12RP—3/5/14; 13RP—3/11/14; 14RP—3/12/14; 15RP—3/13/14; 16RP—3/17/14; 17RP—3/18/14; 18RP—3/19/14; 19RP—3/20/14; 20RP—4/25/14.

[2] Antoinette Jordan, also known as Antoinette Weekly and Antoinette Bonds, is referred to by her first name for the sake of clarity.

[3] Veatrice Jordan is referred to by her first name for the sake of clarity as well.

Police also took a statement from Antoinette. 17RP 719. Antoinette was never able to testify under oath or be cross examined, however, because she died in June 2013. 16RP 499, 630. A primary pre-trial issue was whether her statements to police after the incident would be admitted at trial. 5RP 3.

a. Pretrial hearing on the admissibility of Antoinette's statements

The court considered the parties' written and oral arguments regarding admissibility of Antoinette's statements and determined it needed to hear testimony on the issue. It then held an evidentiary hearing on admissibility. 6RP 21-22; 8RP 90-158.

Tacoma Police Officer John Moses testified that he was dispatched in response to Veatrice's 911 call at 2:38 p.m., and he arrived at the house at 2:42. 8RP 91. He immediately started a security check of the house, going upstairs to search room by room for any suspects. 8RP 92. When he opened the closet door in one of the rooms, he found Antoinette hiding inside. He ordered her out of the closet, but she refused and had to be pulled out by Moses and Officer Brandon Showalter. 8RP 93-95. Moses testified that she appeared terrified, she did not respond to questions, and tears were running down her face. 8RP 94-96.

Moses left Antoinette with Showalter and finished his security check of the house. No other suspects were found. 8RP 96. Moses did not hear any sounds of struggle while he was searching the house. There was no banging, wrestling, crying, or anything else to make him believe anyone was in danger. 8RP 100-01. He never found any kind of threat inside the house and never heard anything he would perceive as a threat. 8RP 109.

After securing the house, Moses participated in a search of the area in attempt to locate Bonds. 8RP 97. It had been reported before he arrived at the house that Bonds had left the scene and was running away. 8RP 111-12. Moses testified that he would not characterize his search of the area as an emergency, although he considered it prudent to locate Bonds. 8RP 111.

Officer Showalter testified that he was one of the first officers to arrive at the house. He contacted Veatrice and the two teenagers, and they gave a brief description of what happened. 8RP 117. Veatrice said that Bonds had forced his way into the house, attacked Antoinette, and fled on foot. 8RP 118. Veatrice told Showalter that there was no one else in the house, and he began a security sweep. 8RP 117. He cleared the downstairs first, and then headed upstairs. 8RP 118-19. When Moses found Antoinette in the closet, they did not know who she was, so

Showalter handcuffed her until they could identify her. 8RP 120. Showalter took her downstairs, Veatrice explained who she was, and Showalter removed the handcuffs. 8RP 120.

Showalter asked Antoinette what happened and if she was okay. She was trembling and appeared terrified, sitting with a defensive posture. 8RP 121. Because she was not responding to Showalter's questions, he gave her some time to collect herself. 8RP 120-21. Showalter noticed some marks on Antoinette's neck and that a finger was bleeding. When she declined medical attention, Showalter asked Veatrice to get her a towel for her finger. 8RP 121.

Showalter waited five or ten minutes for Antoinette to collect herself before he questioned her. 8RP 122, 124. When he started talking to her he knelt by her chair, so that she would feel more comfortable than if he were standing over her. 8RP 124. In response to Showalter's questioning, Antoinette said that Bonds had arrived and forced his way into the house. He was screaming and angry, and he choked and hit her. Veatrice called 911, and Antoinette was able to break free. She ran upstairs and hid in the closet. 8RP 125. Showalter testified that Antoinette kept repeating "he's going to kill me" as she gave her description, and she continued to look frightened. 8RP 125-26. This conversation lasted about ten minutes. 8RP 126.

Like Moses, Showalter had not heard any sounds of struggle when he arrived at and searched the house. 8RP 129. He knew before heading upstairs that Bonds had left. 8RP 130. No one was screaming, banging, or running around, and there was no indication that anyone was seriously injured. 8RP 133. Once Antoinette was downstairs it was clear she was not in need of medical attention. 8RP 134.

After presenting this testimony, the State argued that Antoinette's statements qualified as excited utterances, and they were admissible at trial because they were not testimonial. 8RP 145-47. Defense counsel argued that because the statements were not made to resolve an ongoing emergency but to provide information in the investigation of past actions, the statements were testimonial. Since Antoinette had never been subject to cross examination regarding the statements, admission would violate Bonds' constitutional right of confrontation. 8RP 150-51.

The court found that Antoinette was under the stress of a startling event when she made the statements, and they therefore constituted excited utterances. 8RP 152-54. It also concluded that the statements were not testimonial, reasoning that although there may not have been a threat at the moment of the interview, there was a threat of harm to Antoinette in the minds of the officers who were trying to get more

information about Bonds so they could apprehend him for her protection. 8RP 156-58. The court admitted Antoinette's statements. 8RP 158.

b. The court's denial of the defense motion to call Tucker as a witness

Following the hearing on Antoinette's statements, defense counsel requested permission to add Treyvion Tucker to his witness list. He explained that Tucker had not previously been on the list because when he spoke to police at the time of the incident, he gave the name Marcus Mayers. No one had been able to locate a person with that name. Without counsel's knowledge, Tucker had been in the courtroom during the hearing. At the recess, Tucker approached counsel and explained that he was one of the teenagers in the house, and he had information about what actually happened. 8RP 163.

The State objected that Tucker had heard other witnesses testify at the hearing, after the court had granted a motion excluding witnesses, and he was just trying to help Bonds, who is his grandfather. 8RP 165. The court denied counsel's request to call Tucker as a witness. The court found the timing and content of Tucker's proposed testimony suspicious and ruled that it would be a miscarriage of justice to allow Tucker to testify, based on the late disclosure and violation of the ruling excluding witnesses. 8RP 166-67.

c. Trial testimony

Damarcus Tate testified that at the time of the incident he lived with Antoinette and Veatrice, his grandmother and aunt, and that Bonds lived with them as well. 15RP 447, 449. He and Tucker had been in the living room when he saw Bonds arguing with Antoinette outside. 15RP 451. He saw them pushing and yelling at each other, and he saw Bonds hit Antoinette one time. 15RP 454, 456. Antoinette was angry, and she threw a rock, breaking the front windshield of a car. 15RP 457. Tate saw Veatrice on the phone, and Bonds left. Antoinette came back inside and went upstairs. 15RP 457-59. Police then arrived, searched the house, and spoke to Antoinette and Veatrice. 15RP 458-59.

Veatrice testified that she was cooking dinner, Antoinette was talking with her, and Tate and Tucker were watching television when Bonds walked into the house through the open sliding glass door. 16RP 512-15. Bonds and Antoinette started fighting, and she slapped him. He then hit her and dragged her outside. 16RP 516-17. At that point, Veatrice called 911. 16RP 517. Veatrice testified that as Bonds hit Antoinette, a car window broke, but she did not see how it happened. 16RP 520-22. Bonds then walked out of the yard. Veatrice testified that Bonds then got into a car, although she had never mentioned a car in any of her previous statements. 16RP 524, 551, 586. Veatrice testified that

when Antoinette came in the house she was upset and said that Bonds was going to kill her. 16RP 526. Antoinette must have gone upstairs at that point, but Veatrice said did not see her. 16RP 526, 558, 592, 594.

Officers Moses and Showalter testified that they responded to Veatrice's 911 call, and when they cleared the house, they found Antoinette in an upstairs closet. 17RP 687, 693, 705, 711. Showalter testified about his interview with Antoinette and the description she gave of what happened. 17RP 718-21.

The State also presented recordings of telephone calls between Bonds and his family members. Exhibits 25A, 25C[4]. In these calls Bonds discussed the burglary charge and statements Antoinette and Veatrice made or should make regarding forced entry. Id.

Bonds testified in his defense that he had been living with Antoinette for three months before the alleged incident. His clothing, belongings, and car were at the house. 17RP 756-57. He testified that Antoinette had smashed the back window of his car as well as the windshield of her car that day. 17RP 759-60.

Bonds explained that Antoinette was angry because he had gone to a casino the night before. When he was about to leave again that

[4] The first jury trial had ended in a mistrial, because the State failed to completely redact references to a third strike from the jail phone call recordings as ordered by the court. 10RP 214-15; 12RP 363-65, 368, 382-83. The recordings admitted in the second trial were properly redacted.

afternoon, she broke down and started crying. 17RP 762-65. He saw her pick up a rock and throw it at his car. Then she picked up another rock and threw it at her car. When he tried to grab the rock from her, he fell forward and grabbed her instead. 17RP 771. Antoinette went berserk, and Bonds yelled for Veatrice to come help him with her. He let Antoinette go, but she reached for another rock, so he grabbed her again. By that time, Bonds believed the police were already on the way, so he let go of Antoinette and walked away. 17RP 771-72. Bonds testified that there was no confrontation in the house and he did not hit Antoinette. 17RP 772.

After he was arrested, Bonds learned that he was charged with burglary, and he believed someone had reported that he broke into the house. 17RP 795. He talked to his family members about wanting someone to talk to Antoinette about that charge so that the truth would come out. He was not trying to get anyone to change their testimony, just tell the truth. 17RP 773-74, 790-91.

C. ARGUMENT

1. ADMISSION OF ANTOINETTE JORDAN'S TESTIMONIAL STATEMENTS TO OFFICER SHOWALTER VIOLATED BONDS' RIGHT TO CONFRONTATION.

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right … to be confronted with the witnesses against him." U.S. Const. amend. VI; see also Wash. Const. art. I, § 22. Confrontation is a fundamental bedrock protection in a criminal case and requires evidence to be tested by the adversarial process. Crawford v. Washington, 541 U.S. 36, 42, 124 S.Ct. 1354, 158 L. Ed. 2d 177 (2004). The Confrontation Clause "commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross examination." Crawford, 541 U.S. at 61. Thus, the State may offer out-of-court testimonial statements at trial only if the declarant is unavailable as a witness and the defendant has had the prior opportunity to cross examine the declarant. Id. at 59. Admission does not depend on whether the statements fall within a hearsay exception. The only method for satisfying the Confrontation Clause is cross examination. Id. at 59.

An appellate court reviews a confrontation clause challenge de novo. State v. Koslowski, 166 Wn.2d 409, 417, 209 P.3d 479 (2009). The confrontation clause applies to "witnesses" against the accused—those who "bear testimony." Koslowski, 166 Wn.2d at 417 (quoting Crawford, 541 U.S. at 51). While the confrontation clause bars admission a testimonial statements by a witness who did not appear at trial and was not

subject to cross examination, out of court statements that are nontestimonial are not covered by the confrontation clause. Davis v. Washington, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). Thus, where out-of-court statements of a non-testifying witness have been admitted at trial, the determination on appeal is whether those statements were testimonial.

Statements taken by police officers during interrogations are usually, but not always testimonial. The Supreme Court has explained:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 547 U.S. at 822. Four factors guide the determination of whether the primary purpose of a police interrogation was to develop testimony:

> (1) Was the speaker speaking about current events as they were actually occurring, requiring police assistance, or was he or she describing past events? …
> (2) Would a "reasonable listener" conclude that the speaker was facing an ongoing emergency that required help? …
> (3) What was the nature of what was asked and answered? Do the questions and answers show, when viewed objectively, that the elicited statements were necessary to resolve the present emergency or do they show, instead, what had happened in the past? …
> (4) What was the level of formality of the interrogation?

Koslowski, 166 Wn.2d at 419 (citing Davis, 547 U.S. at 827).

In Davis, the Supreme Court decided two cases, Davis and Hammon, both involving domestic disputes in which the victims called 911. The statements at issue in Davis were made during the course of a frantic 911 call seeking protection from the defendant, while the declarant was alone and unprotected by the police. She was in apparent immediate danger and seeking aid, not relating past events. The court held that her statements were nontestimonial. Davis, 547 U.S. at 831-32.

By contrast, in Hammon, the statements at issue were made by the defendant's wife after police arrived at the house, separated husband and wife, and interviewed the wife. When police arrived, the wife said everything was fine, and police heard and saw nothing to indicate an ongoing emergency. Police questioned the wife, not to figure out what was happening, but to determine what had happened. And while the interrogation did not occur at the police station in an interview room, the setting was formal enough, with police separating husband and wife, and the officer receiving answers for use in his investigation, to make the statements testimonial. Davis, 547 U.S. 828-29.

The Washington Supreme Court applied these factors in Koslowski. There, the defendant was charged with a home invasion robbery, but the victim, Alvarez, died before trial, and the trial court

admitted her statements to police. Koslowski, 166 Wn.2d at 412. Officers had responded to a 911 call, arriving about two minutes after the call was made. They found Alvarez still on the phone with 911, extremely emotional and very upset. She started telling the officers what was going on, showing them wire ties which had been used to bind her hands. The officers asked more questions about what happened, and she responded. The officers were trying to gather as much information as possible to relay to other officers who were searching for the suspects. Id. at 414. Alvarez described being accosted at gunpoint outside her home, pushed inside, and tied up while the men robbed her. After she heard them leave she was able to free her hands and call 911. Id. at 415.

Reviewing these circumstances, the Court concluded that Alvarez's statements were testimonial. Id. at 421. First, it noted that Alvarez was describing events that already occurred. The record showed that the men had completed the robbery and left, and there was no indication that she was still in danger from them. Id. at 422. Second, the court considered whether a reasonable listener would believe Alvarez was facing an ongoing emergency. It noted that her statements were made after the police arrived. While she was clearly frightened, a reasonable listener would conclude that the danger had passed. Id. at 423.

Next, the court considered the nature of the interrogation. It noted that "statements might be nontestimonial if the police interrogation, objectively viewed, was an effort to establish an assailant's identity so that dispatched officers might know whether they would be encountering a violent felon." Id. at 425. Where such statements are a cry for help or provide information that enable officers to immediately end a threatening situation, they are not testimonial. But when the officers arrived at Alvarez's house, the crime had already occurred, the suspects had left, and Alvarez was not in any apparent immediate danger. Id. at 426. The mere fact that the suspects were at large and that the officers relayed information from Alvarez to officers in the field was insufficient to show that the questions asked and answered were necessary to resolve a present emergency. Id. at 426-27.

As to the fourth factor, the court acknowledged that Alvarez's emotional state, and the fact that the interrogation occurred in her home, caused the interrogation to be less formal than it might have been. The court recognized, however, that there is a certain level of formality "whenever police engage in a question-answer sequence with a witness." Id. at 429.

Considering all these factors, the court concluded that Alvarez's statements were testimonial. "They were made in the course of police

interrogation under circumstances objectively indicating that there was no ongoing emergency and the primary purpose of the interrogation was to establish past events potentially relevant to later criminal prosecution." Id. at 430. Because Alvarez was unavailable to testify and the defendant had no prior opportunity to cross examine her, admission of her statements violated his constitutional right to confrontation. Id. at 431.

In this case, as in Koslowski and Hammon, there was no ongoing emergency, and the primary purpose of the police interrogation was to prove past events. As in Hammon, police responded to a 911 call of a domestic dispute, but when they arrived they found no evidence that the situation was ongoing. Bonds had left while Veatrice was on the phone with 911. Moreover, there were no other suspects in or around the house, and Antoinette was not in need of medical care. As in Koslowski, police arrived within minutes of the call and spent some time gathering information. Officer Showalter then asked Antoinette to describe what had happened, and she did. An analysis of the factors identified in Davis and discussed in Koslowski illustrates that the primary purpose of Showalter's interrogation and Antoinette's statements was to gather information about past events, not to resolve an ongoing emergency.

First, the events Antoinette described had already occurred. While she said that Bonds was going to kill her, at the time of the questioning he

was gone, he was identified, police were looking for him, and there were police inside and outside of her house. As in Koslowski, there was no indication she was in immediate danger.

Second, a reasonable listener would recognize that there was no ongoing emergency. Showalter testified that they learned from Veatrice that Bonds had left the house on foot, and officers were doing a search of the area. A security sweep had been done of the house. At the time he spoke with Antoinette, there was no known or suspected threat in the house. His weapon was put away, and there were other officers inside and outside. 8RP 136-37. His purpose in questioning Antoinette was not to determine if she needed to go to the hospital, because he had already determined that she did not. 8RP 138. And, although he thought Bonds could be a threat to the community, his purpose in questioning Antoinette was not to locate Bonds, because he had already determined that Bonds was gone and other officers were looking for him. 8RP 138-39. The fact that Antoinette was distressed, as Showalter described, is not dispositive of whether an emergency existed "because in some cases, like domestic assault cases, the victim may be upset long after the emergency situation has been resolved." Koslowski, 166 Wn.2d at 424.

As to the third factor, Showalter did not question Antoinette to identify Bonds or to enable him to render aid or immediately end a

threatening situation. Veatrice had already identified Bonds, and Showalter did not question Antoinette until after he had determined that she did not need medical aid and that Bonds was not in the house. 8RP 141. The mere fact that information was being relayed to officers in the field looking for Bonds did not prove that the statements were necessary to resolve a present emergency. This was not a situation where an unknown and armed assailant potentially posing an unidentified threat to the public was at large. See Michigan v. Bryant, 562 U.S. 344, 131 S. Ct. 1143, 179 L.Ed.2d 93 (2011) (statement of shooting victim, minutes after crime, identifying shooter and location of crime were made to resolve ongoing threat to public). There was no evidence that Bonds was armed. While Antoinette told the police she thought Bonds wanted to retaliate for her testimony that resulted in his previous conviction, Showalter admitted that she never related any concern that Bonds would harm random people on the street, and there was no indication that he posed a threat to any other specific person. 8RP 142.

The final factor considers the formality of interrogation. This was not a recorded interview at a police station. Nor were Antoinette's statements frantic cries for help, however. Instead, after making sure Antoinette was not in danger from Bonds or in need of medical assistance, Showalter sat her in the living room and allowed her five to ten minutes to

collect her thoughts. He then asked her what had happened, and he asked follow up questions to get more detail. 8RP 141, 143. Showalter's efforts in preparing for the interview and the question and answer sequence were sufficiently formal that the investigatory purpose was clear.

As in Koslowski, the out of court statements admitted here were testimonial. They were made in the course of police interrogation, the primary purpose of which was to establish past facts, under circumstances which indicated there was no ongoing emergency. See Koslowski, 166 Wn.2d at 430. Because Antoinette was unavailable to testify at trial, and because Bonds had no prior opportunity to cross examine her, admission of her statements at trial violated Bonds' constitutional right of confrontation.

Error in admitting statements in violation of the confrontation clause can be considered harmless only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. Koslowski, 166 Wn.2d at 431. That is not the case here.

Other than Antoinette's statements, the State's case on the assault and harassment charges rested on testimony from Veatrice and Damarcus Tate. Both witnesses had changed their description of that day multiple times, calling into question both their testimony and the credibility of their earlier statements. Moreover, Bonds testified that he did not assault

Antoinette. Given the weakness of the State's evidence and the contradictory evidence from the defense, it cannot be said that the jury necessarily would have found Bonds guilty if Antoinette's statements had been properly excluded. Violation of Bonds' right to confrontation requires reversal.

2. THE TRIAL COURT VIOLATED BONDS' RIGHTS TO DUE PROCESS AND TO CALL WITNESSES WHEN IT PRECLUDED HIS GRANDSON FROM TESTIFYING.

The right to compel witnesses is guaranteed by the federal and state constitutions. U.S. Const., amend. VI; Wash. Const. art. I, § 22; Taylor v. Illinois, 484 U.S. 400, 412-13, 108 S. Ct. 646, 98 L.Ed.2d 798 (1988); State v. Maupin, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996). The right to have the trier of fact hear a witness's testimony is "grounded in the Sixth Amendment." Taylor, 474 U.S. at 409.

Additionally, the right to call witnesses in one's own behalf has long been recognized as essential to due process. Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L.Ed.2d 297 (1973). A defendant's right to compel the attendance of witnesses is "in plain terms the right to present a defense" and "a fundamental element of due process of law." Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L.Ed.2d 1019 (1967). Thus, courts must jealously guard a criminal

defendant's right to present witnesses in his defense. State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984).

Further, a criminal defendant's right to present witnesses is an "essential attribute of the adversary system itself." Taylor, 484 U.S. at 408. The Court explained:

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Id. at 408-09 (quoting United States v. Nixon, 418 U.S. 683, 709, 94 S. Ct. 3090, 3108, 41 L.Ed.2d 1039 (1974)). Thus, a trial court order entirely excluding the testimony of a material defense witness directly implicates not only the defendant's constitutional right to offer testimony on his own behalf, but also the integrity of the adversary system itself.

It is within the court's discretion to exclude witnesses from the courtroom until after they have testified. ER 615 ("At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion…."); State v. Dixon, 37 Wn. App. 867, 877, 684 P.2d 725 (1984).

But the rule does not specify the sanction to be employed when a witness violates this rule. ER 615.

Several Court of Appeals decisions have upheld trial court decisions allowing witnesses to testify despite violating ER 615 exclusion orders. State v. Skuza, 156 Wn. App. 886, 235 P.3d 842 (2010) (citing Dixon, 37 Wn. App. at 877; State v. Schapiro, 28 Wn. App. 860, 868, 626 P.2d 546 (1981); State v. Walker, 19 Wn. App. 881, 883, 578 P.2d 83, review denied, 90 Wn.2d 1023 (1978)). In Skuza, the question was whether the trial court had properly suppressed testimony for violation of an ER 615 ruling. In that case, suppression was not appropriate because there was no evidence that the order excluding witnesses had been violated. The Court did not address whether suppression violated Skuza's constitutional right to present a defense. Nor has any Washington case addressed the issue in this context.

Federal courts interpreting the similar federal rule have, however, adhered to the general rule that a defense witness may not be excluded solely for violating a ruling excluding witnesses. See, e.g. State v. Burton, 101 Wn.2d 1, 6, 676 P.2d 975 (1984) (this Court may look to federal case law for assistance in interpretation of certain state rules), overruled on other grounds by State v. Ray, 116 Wn.2d, 531, 806 P.2d 1220 (1991). Under the federal rule, if a witness violates an exclusion order, he may be

held in contempt, and his testimony is subject to cross examination and comment regarding the violation, but he is not disqualified from testifying merely on that basis. United States v. Gibson, 675 F.2d 825, 835-36 (6th Cir. 1982) (quoting Holder v. United States, 150 U.S. 91, 92, 14 S. Ct. 10, 37 L.Ed. 1010 (1893)). The Fifth Circuit has also noted that "it is generally true that a witness should not be disqualified for this reason alone." Calloway v. Blackburn, 612 F.2d 201, 204 (5th Cir. 1980) (discussing violation of witness sequestration rule).

Under the federal rule, the drastic remedy of denying the defense's right to present witnesses is justified only when there is a "knowing intelligent waiver" or "consent, procurement, or knowledge on the part of the defendant or his counsel." Id. at 204; Gibson, 675 F.2d at 836. Washington courts apply the same general principles when a State's witness violates an ER 615 exclusion order. See e.g. Dixon, 37 Wn. App. at 877 (court did not abuse discretion in allowing witness to testify where prosecutor had not anticipated calling witness and there was no bad faith); State v. Bergen, 13 Wn. App. 974, 977-78, 538 P.2d 533 (1975) (two State's rebuttal witnesses permitted despite their hearing defendant's testimony, because there was no evidence of bad faith).

Given the importance of the defendant's right to present a defense, this Court should hold that more than a mere violation of an ER 615 ruling

is required before the defendant may be prevented from presenting his case. The extreme sanction of excluding a material witness should be limited to situations of demonstrated bad faith or collusion.

The court below abused its discretion and violated Bonds' right to present a defense by precluding the defense from calling Tucker as a witness. "[D]iscretion does not mean immunity from accountability." Carson v. Fine, 123 Wn.2d 206, 226, 867 P.2d 610 (1994). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Given the fundamental nature of Bonds' right to present Tucker's material testimony, the absence of any evidence of bad faith, and the availability of less drastic remedies, the court abused its discretion in excluding Tucker's testimony.

The court below denied the defense request to add Tucker to the witness list. Tucker had been present in the courtroom during the pretrial hearing at which the two officers who spoke to Antoinette testified. At that point, defense counsel was unaware that Tucker was a witness to the incident. Tucker had given the name "Marcus Mayers" to police at the time, and efforts to locate someone by that name had failed. It was only after the hearing that Tucker introduced himself to counsel and explained

the situation. Thus, there is no indication that either the defense or Tucker deliberately violated the ER 615 exclusion order.

The court felt it would be a miscarriage of justice to allow Tucker to testify after hearing the pretrial testimony in light of its previous ruling excluding witnesses. The court expressed concern that Tucker could adapt his testimony to counter the testimony he had heard in court. It is important to note that no witness to the actual incident had testified at the pretrial hearing. Neither Veatrice nor Tate had testified, nor had Bonds. It is thus unlikely that Tucker's presence at the pretrial hearing would have impacted his testimony about what happened.

Most importantly, however, the court never considered any less severe sanction for violation of its exclusion order. Allowing Tucker to testify with the understanding that he would be subject to cross examination regarding the fact that he gave a false name to police and was present during the officers' testimony would have addressed the court's concerns while protecting Bonds' right to present witnesses in his defense. The court abused its discretion in precluding Tucker's testimony.

The court's error cannot be deemed harmless. There is no question that Tucker was a material witness. Everyone who was at the house during the incident with Bonds and Antoinette testified that Tucker was present. 15RP 450; 16RP 515; 17RP 775. The police officer who

responded to the 911 call testified that he spoke to two teenage boys, and the State presented evidence that Tucker was one of them. 16RP 638; 17RP 709.

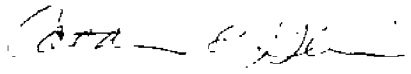
Because Tucker was clearly a material witness, the jury would naturally question his absence. The prosecutor took advantage of this situation in closing argument, asking the jury to consider why Tucker had given a false name to law enforcement if he could have corroborated Bonds' story. While the court sustained defense counsel's second objection to this argument, the seed of inference was planted that the defense would have called him as a witness if he could have helped the defense. 18RP 886. The court's improper preclusion of Tucker as a witness was not harmless, and Bonds' convictions should be reversed.

D. CONCLUSION

For the foregoing reasons, Bonds asks this Court to reverse his convictions and remand for a new trial.

DATED January 26, 2015.

Respectfully submitted,



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Today I caused to be mailed copies of the Brief of Appellant and Designation of Exhibits in *State v. Gregory Bonds,* Cause No. 46212-5-II as follows:

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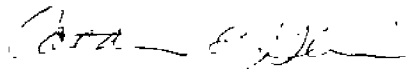

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