

67912-1

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No. 67912-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS JEFFERSON HOPKINS,

Appellant.

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

APPELLANT'S OPENING BRIEF

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COURT OF APPEALS
STATE OF WASHINGTON
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A. ASSIGNMENT OF ERROR

The trial court abused its discretion in admitting Mary Brown's highly prejudicial and irrelevant testimony about a letter purportedly written by Thomas Hopkins.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Only relevant evidence is admissible at trial. Evidence should be excluded if its potential for unfair prejudice outweighs its probative value. Did the trial court abuse its discretion in admitting testimony about a letter purportedly written by Mr. Hopkins, where the State did not establish the letter was actually written by Mr. Hopkins or that it pertained to this case?

C. STATEMENT OF THE CASE

On October 26, 2009, at around noon, Marites Beck was working as a teller at the Bank of America located at Fifth and Columbia in downtown Seattle. 8/15/11RP 55. A man approached her window, leaned over, and said, "Give me your money." 8/15/11RP 56. Ms. Beck asked the man, "How may I help you? Do you need to withdrawal [sic]?" 8/15/11RP 56. He replied, "No, give me your money," and asked for 50- and 100-dollar bills. 8/15/11RP 57. Ms. Beck said those bills were in a different drawer away from her teller

window. 8/15/11RP 58. The man then said, “Give me your money. I have a gun here.”¹ 8/15/11RP 58. Ms. Beck walked away from her window toward the other drawer and waved to get the attention of the manager, Flor Delgado, who was standing nearby. 8/15/11RP 60.

Ms. Delgado approached the man and asked how she could help him. 8/15/11RP 111. He said, “I need \$4,000.” 8/15/11RP 11. Ms. Delgado told him to fill out a withdrawal slip and he replied, “No you don’t understand. I need \$4,000.” 8/15/11RP 112. He showed her a piece of paper he was holding, which said, “\$4,000” and “you’re being robbed.” 8/15/11RP 112.

Ms. Delgado approached Michael Fann, a uniformed Seattle police officer who happened to be in the bank at the time making a deposit. 8/15/11RP 138-40. Ms. Delgado pointed out the man with the note and told Officer Fann that the bank was being robbed. 8/15/11RP 112. Officer Fann looked at the man, who put up his hands and walked toward the door. 8/15/11RP 141-42. The officer followed the man outside, where the man jumped into a waiting taxi cab. 8/15/11RP 143.

Ms. Beck identified Thomas Hopkins as the man who approached her teller window and asked for money. 8/15/11RP 85.

¹ There was no evidence that Mr. Hopkins actually had a firearm.

Mary Brown, Mr. Hopkins's girlfriend, was waiting in the back seat of the taxi cab. 8/16/11RP 41-42. When Mr. Hopkins came out of the bank, Ms. Brown waved to him and he got into the cab. 8/16/11RP 43. He yelled at the driver to drive away but instead the driver got out of the cab. 8/16/11RP 43-44. Mr. Hopkins got into the front seat and tried to drive the car away but it would not go. 8/16/11RP 44. He jumped out of the car and ran away. 8/16/11RP 44.

Police apprehended Mr. Hopkins in a motel room four days later. 8/15/11RP 160.

The State charged Mr. Hopkins with one count of attempted first degree robbery, RCW 9A.28.020, 9A.56.200(1)(b), 9A.56.190. CP 20.

At the jury trial, Ms. Brown testified she and Mr. Hopkins had had an off-and-on romantic relationship for about 20 years and had one child in common. 8/16/11RP 36. She had pled guilty to one count of rendering criminal assistance for failing to tell police of Mr. Hopkins's whereabouts after the alleged attempted robbery. 8/16/11RP 46-49. She agreed to testify against him as part of her plea agreement. 8/16/11RP 49.

Ms. Brown testified she had received letters from Mr. Hopkins in the past and could recognize his handwriting. 8/16/11RP 53. The

prosecutor then showed her a letter that was addressed to Ms. Brown and signed “from Thomas.” 8/15/11RP 94. The letter was purportedly sent to Ms. Brown in jail. 8/15/11RP 94. But Ms. Brown never received the letter and had never seen it before. 8/16/11RP 53. She testified the handwriting in the letter was similar to Mr. Hopkins’s handwriting. 8/16/11RP 53. In the letter, the writer asked Ms. Brown not to testify because no one in the bank would be able to identify him. 8/16/11RP 54.

Defense counsel objected to admission of testimony about the letter, arguing the State had not established when the letter was written, whether it was written by Mr. Hopkins, or whether it pertained to this case.² 8/10/11RP 72; 8/16/11RP 60. The letter itself was not admitted into evidence. 8/16/11RP 61.

Mr. Hopkins presented the testimony of Jack Reiter, a forensic psychiatrist. 8/16/11RP 87. Dr. Reiter evaluated Mr. Hopkins and diagnosed him with paranoid schizophrenia, depression and antisocial personality disorder. 8/16/11RP 88. Mr. Hopkins had a history of paranoid schizophrenia and depression dating back to the age of 18. 8/16/11RP 90. Mr. Hopkins has auditory and visual hallucinations.

² The court did not explicitly rule on the objection but implicitly overruled it by permitting Ms. Brown to testify about the letter.

8/16/11RP 88. He is stable when he is taking medication although the medication does not completely control the hallucinations. 8/16/11RP 88. Even when taking medication he is still obviously mentally ill but can function in a structured environment. 8/16/11RP 89. If Mr. Hopkins is not taking his medication, he can become “floridly” psychotic and respond to the voices. 8/16/11RP 88. “Floridly” psychotic means out of touch with reality. 8/16/11RP 101. When Mr. Hopkins is not taking his medication, his mental illness is severe enough that he could not form the intent to rob a bank and may be unable to distinguish right from wrong. 8/16/11RP 89, 100, 137. He would not be able to perform complex behavior; his behavior would be disorganized, jumbled, and ineffectual. 8/16/11RP 101, 113.

The jury was instructed they could consider evidence of Mr. Hopkins’s mental illness or disorder in deciding whether he had the capacity to form the intent necessary to commit the crime. CP 155.

Despite the instruction, the jury found Mr. Hopkins guilty of attempted first degree robbery as charged. CP 130.

At sentencing, the court imposed an exceptional sentence downward, finding Mr. Hopkins was under the influence of a mental

disorder at the time of the offense and was unable to conform his conduct to the requirements of the law. 10/14/11RP 29-30.

D. ARGUMENT

MS. BROWN'S HIGHLY PREJUDICIAL AND
IRRELEVANT TESTIMONY ABOUT A LETTER
PURPORTEDLY WRITTEN BY MR. HOPKINS WAS
IMPROPERLY ADMITTED

The admission of evidence is reviewed for abuse of discretion.

City of Auburn v. Hedlund, 165 Wn.2d 645, 654, 201 P.3d 315 (2009).

An abuse of discretion occurs if the court's decision is manifestly unreasonable or rests on untenable grounds. State v. Griffin, 173 Wn.2d 467, 473, 268 P.3d 924 (2012). A decision rests on untenable grounds if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. Id.

1. The trial court abused its discretion in admitting Ms. Brown's testimony about the letter because it was not relevant and was highly prejudicial.

Only relevant evidence is admissible. ER 402. "Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Even if evidence is relevant, it may be excluded "if its probative

value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” ER 403.

Evidence is relevant only if there is “a logical nexus between the evidence and the fact to be established.” State v. Cochran, 102 Wn. App. 480, 486, 8 P.3d 313 (2000).

Here, the trial court admitted Ms. Brown’s testimony about a letter purportedly written to her from “Thomas,” in which the letter writer asked her not to testify. 8/16/11RP 53-54. Presumably the State offered the letter to show consciousness of guilt. Evidence that a defendant tried to prevent a witness from appearing and testifying at trial is relevant because it is evidence of the defendant’s consciousness of guilt. State v. Moran, 119 Wn. App. 197, 218-19, 81 P.3d 122 (2003).

The State did not establish the required nexus between the purported letter and Mr. Hopkins’s consciousness of guilt. The State did not prove when the letter was written, whether Mr. Hopkins actually wrote the letter, or whether the letter pertained to this case.

In addition, any probative value of the letter was outweighed by the possibility of unfair prejudice. Evidence causes unfair prejudice when it is more likely to arouse an emotional response than a rational

decision by the jury. Hedlund, 165 Wn.2d at 654. Alternatively, unfair prejudice occurs when the jury makes erroneous inferences from the evidence that undermine the goal of the rules to promote accurate fact finding and fairness. Id. at 654-55.

Here, Ms. Brown's testimony about the letter was unfairly prejudicial because it likely aroused an emotional response in the jury and undermined the jury's ability to make accurate findings of fact. The jury likely condemned the letter writer as scheming and manipulative. They were probably unable to put their emotional reactions aside in order to assess rationally the credibility of the testimony. The jury probably could not rationally appreciate that the letter might not have been written by Mr. Hopkins and might not even pertain to this case.

2. The trial court abused its discretion in admitting Ms. Brown's testimony about the letter because she did not have personal knowledge about it.

ER 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

"Under ER 602, a witness must testify concerning facts within his personal knowledge, that is, facts he has personally observed."

State v. Vaughn, 101 Wn.2d 604, 611, 682 P.2d 878 (1984). The burden of laying a foundation that the witness had an adequate opportunity to observe the facts to which he testifies is upon the proponent of the testimony. Id. The proponent must provide evidence “sufficient to support a finding” of personal knowledge. Id.

Here, the State did not show Ms. Brown had personal knowledge of the letter. Ms. Brown plainly testified she did not receive the letter and had never seen it before. 8/16/11RP 53. Because she never personally observed the letter, prior to trial, she did not have personal knowledge of it and the court abused its discretion in admitting her testimony under ER 602. Vaughn, 101 Wn.2d at 611.

3. Admission of the testimony was not harmless.

Evidence erroneously admitted at trial is harmless only if the evidence was of minor significance in reference to the overwhelming evidence as a whole. State v. Grier, 168 Wn. App. 635, 278 P.3d 225, 233 n.33 (2012).

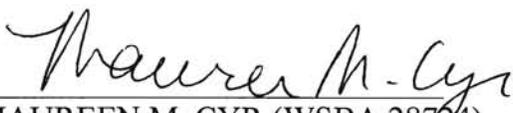
As stated, Ms. Brown’s testimony about the letter was highly prejudicial. The evidence was not of minor significance in reference to the other evidence of guilt. Mr. Hopkins presented evidence to show he could not have formed the intent necessary to commit the crime. The trial court found the evidence of Mr. Hopkins’s mental illness credible and

imposed an exceptional sentence downward based on its finding that Mr. Hopkins had a mental disorder at the time of the offense and could not conform his conduct to the law. 10/14/11RP 29-30. Ms. Brown's testimony likely led the jury to conclude Mr. Hopkins had a guilty conscience, which severely undermined his diminished capacity defense. Therefore, admission of the evidence was not harmless and the conviction must be reversed.

E. CONCLUSION

The trial court abused its discretion in admitting highly prejudicial evidence that was only marginally relevant. The conviction must be reversed.

Respectfully submitted this 27th day of August, 2012.


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DIVISION ONE**

STATE OF WASHINGTON,)	
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Respondent,)	
)	NO. 67912-1-I
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THOMAS HOPKINS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF AUGUST, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> THOMAS HOPKINS 964174 MONROE CORRECTIONAL COMPLEX PO BOX 514 MONROE, WA 98272	(X) () ()	U.S. MAIL HAND DELIVERY _____

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SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF AUGUST, 2012.

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