

68327-6

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No. 68327-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RONALD HUBBARD,

Appellant.

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

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred and deprived Mr. Hubbard of his right to a trial before an impartial jury, in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, §§ 3 and 22 of the Washington Constitution.

2. The trial court denied Mr. Hubbard of his Sixth Amendment right to present a defense when it barred the admission of relevant evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth and Fourteenth Amendments to the United States Constitutions, as well as Article I, §§ 3 and 22 of the Washington Constitution, guarantee a defendant the right to a trial by an impartial jury. These rights require a trial court to excuse a juror who has an actual bias against the defendant. Here, the trial court denied a defense challenge for cause and permitted a juror to sit on the jury, despite the juror's admission that she was biased and was concerned about her ability to be fair. Did the trial court deprive Mr. Hubbard of his right to an impartial jury?

2. The Sixth Amendment to the United States Constitution guarantees an accused person the right to present a defense and meet the charges against him. Here, the trial court barred Mr.

Hubbard from introducing evidence relevant to the bias and credibility of the alleged victim. Did the court deprive Mr. Hubbard of his right to present a defense?

C. STATEMENT OF THE CASE

Ronald Hubbard met Siobahn Cuddihy and they became romantically involved in approximately 2005. 11 RP 119-27.¹ Ms. Cuddihy had two children of her own, B.M.O., a fourteen year-old daughter, and Sean, a seven year-old son. 12 RP 24-26. Ms. Cuddihy worked as a nursing assistant and Mr. Hubbard drove a tow truck. 11 RP 128-30. About a year later, Mr. Hubbard moved with the family into an apartment in Kent. Id.

For a period of time after the move to Kent, the family dynamic worked well, and this blended family functioned smoothly; B.M.O. acknowledged that she and her step-father got along very well at the beginning. 17 RP 91.

In approximately March 2009, B.M.O. informed her mother that Mr. Hubbard had “touched my butt” with a “hand massager.”

¹ The Verbatim Report of Proceedings consists of 22 non-consecutive paginated volumes, and is referenced as follows: 1 RP (9/20/10, 5/9/11, 10/4/11); 2 RP (6/17/11); 3 RP (10/13/11); 4 RP (10/17/11); 5 RP (10/17-18/11); 6 RP (10/19/11); 7 RP (10/26/11); 8 RP (10/31/11); 9 RP (11/1/11); 10 RP (11/2/11); 11 RP (11/3/11); 12 RP (11/7/11); 13 RP (11/8/11); 14 RP (11/9/11); 15 RP (11/10/11); 16 RP (11/14/11); 17 RP (11/15/11); 18 RP (11/16/11); 19 RP (11/16-17/11); 20 RP (11/17/11); 21 RP (11/18/11); 22 RP (1/27/12).

12 RP 44. When Ms. Cuddihy confronted Mr. Hubbard about this allegation, he denied it and B.M.O. immediately recanted, saying they had just been playing around. 12 RP 46; 16 RP 90-92. No report was made, and family life resumed.

A few months later, the family moved to Oregon, to live in a trailer on the property of Ms. Cuddihy's father. 12 RP 47. B.M.O. had graduated from high school, and Sean was in third grade. Id. In December 2009, the Yamhill County Sheriff Department responded to a domestic disturbance at the property. 11 RP 97-100; 13 RP 62-63. In the midst of an argument between her mother and Mr. Hubbard, B.M.O. had intervened and alleged that Mr. Hubbard had "molested" her when they lived in Kent, years before. 13 RP 62-63.

The Oregon sheriffs deputies interviewed the witnesses and Mr. Hubbard, escorted him from the property, and notified the authorities in Washington. 12 RP 163-72; 13 RP 68-83. B.M.O. and her mother were encouraged to cooperate with a child abuse assessment center called The Juliette House, but they repeatedly refused to make an appointment or to return the calls of the sheriff's department deputies or detectives. 13 RP 97-101. Detective Geist finally informed Ms. Cuddihy that it was not up to the family whether

or not to move forward with the case. Id. at 136. B.M.O. ultimately reported to The Juliette House and completed a child abuse examination and interview, during which she reported more specific acts of abuse.²

Mr. Hubbard was charged with three counts of child molestation in the third degree. CP 39-41. At trial, B.M.O. testified that Mr. Hubbard approached her while they were watching television one day and started talking to her about sex. 16 RP 77-79. He then pulled down her jeans and touched a back massager to her underwear, on her vagina, and would not let her move. Id. at 80-82. B.M.O. testified that a similar incident occurred a few days later, but that this time, her younger brother Sean walked in and interrupted Mr. Hubbard. Id. at 85-87. The third alleged incident involved a father-daughter outing, during which B.M.O. claimed that Mr. Hubbard took her to a private hot tub facility in Federal Way and held her vaginal area against one of the hot tub jets. Id. at 109-115.

Following a jury trial, the jury convicted Mr. Hubbard of one of the two counts involving the back massager, acquitting him of the other, and acquitting him of the hot tub count. CP 94-96; 21 RP 3.

² The report and the interview notes were excluded at trial, under ER 803(a)(4). 7 RP 72.

D. ARGUMENT

1. MR. HUBBARD WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO TRIAL BY AN UNBIASED JURY.

a. The state and federal constitutions guarantee a criminal defendant a trial before an impartial jury. The Sixth and Fourteenth Amendments to the United States Constitution, as well as article I, sections 3 and 22 of the Washington Constitution guarantee a defendant the right to a trial by an impartial jury. Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); State v. Rupe, 108 Wn.2d 734, 748, 743 P.2d 210 (1987), cert. denied, 486 U.S. 1061 (1988). These protections entitle a defendant to a jury of twelve jurors, free of bias, such that there are no “lingering doubts” as to the fairness of the trial. State v. Parnell, 77 Wn.2d 503, 508, 463 P.2d 134 (1969), overruled on other grounds, State v. Fire, 142 Wn.2d 152, 165, 34 P.3d 1218 (2001).⁴

Where a challenge for cause is denied, a defendant may raise the issue on appeal, even where he did not exercise a

⁴ Fire overruled Parnell to the extent that Parnell required reversal of a conviction even where the challenged juror was excused following a peremptory challenge, and thus where no biased juror actually sat on the jury.

peremptory challenge against the juror in question. Fire, 142

Wn.2d at 158.

[I]f a defendant believes that a juror should have been excused for cause and the trial court refused his for-cause challenge, he may elect not to use a peremptory challenge and allow the juror to be seated. After conviction, he can win reversal on appeal if he can show that the trial court abused its discretion in denying the for-cause challenge.

Id. (citing United States v. Martinez-Salazar, 528 U.S. 304, 315-16, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000)).

Martinez-Salazar specifically rejected the government's urging to adopt a rule requiring that a defendant exhaust all or some specified number of peremptory challenges prior to raising the issue on appeal. 528 U.S. at 315. Thus, even though Mr. Hubbard did not exercise a peremptory challenge against Juror 18, he can assert on appeal that he was denied his state and federal rights to an unbiased jury.⁵

b. Because Juror 18 demonstrated actual bias, the trial court erred in denying Mr. Hubbard's for-cause challenge. While the denial of a challenge for cause is within the trial court's discretion, State v. Witherspoon, 82 Wn. App. 634, 637, 919 P.2d

⁵ Mr. Hubbard's ability to raise this issue on appeal is even clearer than in Martinez-Salazar, since Mr. Hubbard did exhaust his peremptory challenges, although he need not have.

99 (1996), if a potential juror demonstrates actual bias, the court must excuse the juror for cause. Otis v. Stevenson-Carson School Dist. No. 303, 61 Wn. App. 747, 754, 812 P.2d 133 (1991). Actual bias is “the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.” RCW 4.44.170(2). A challenge for cause should be granted where a prospective juror’s views “prevent or substantially impair the performance of [her] duties as a juror in accordance with [her] instructions or oath.” Id. In State v. Gonzales, the Court found a prospective juror exhibited actual bias where the juror admitted she had a bias and indicated the bias would likely persist throughout the trial. 111 Wn. App. 276, 281, 45 P.3d 205 (2002), review denied, 148 Wn.2d 1012 (2003). The questioning of Juror 18 revealed a similarly strongly-held bias, and the court wrongly denied the challenge. 9 RP 144-45, 208; 10 RP 44-46, 29-30, 99-100.

Juror 18 candidly acknowledged her bias in response to the trial court’s own questions in voir dire. The court asked the potential jurors whether any juror “for any reason believes that he or she could not be fair and impartial as a juror in this case.” 9 RP

143. Juror 18 was the first to respond to this question, stating, “Just a bias, I guess.” Id. at 144. When the court asked her what kind of bias she had, Juror 18 responded, “I guess a mother with daughters.” Id. After confirming with Juror 18 that her concerns with bias were related to the “subject matter” of the case, the court asked Juror 18 to distinguish whether she was simply “uncomfortable with the subject or whether you don’t believe you could be fair to both the State of Washington and Mr. Hubbard.” Juror 18 replied, “Your Honor, I’m not sure I could be fair and that concerns me ... and I want to be honest about that.” Id. at 145.⁶

Based upon Juror 18’s initial statements of bias, the defense moved to challenge the juror for cause. 9 RP 184-86. The challenge was denied without prejudice, and the court suggested that defense counsel inquire further into the juror’s assertion of bias in an additional round of voir dire. Id. at 186.

Nothing in the court’s or counsel’s subsequent questioning of Juror 18, however, dispelled the actual bias shown by this juror’s initial statements to the court. When defense counsel inquired of several jurors about concerns they might have regarding sitting on

⁶ Defense counsel challenged Juror 18 for cause following the first round of voir dire. 9 RP 184. There were three rounds of voir dire conducted using the same panel, and the defense challenged Juror 18 after each round; each cause challenge was denied. 10 RP 2-3, 29-30, 35-36, 96-97, 99-100.

a sex offense case, he inquired of Juror 18:

Defense: Okay. Anybody else, number – we talked to number 18. We talked to you about that. What's your sentiment on that?

Juror No. 18: Very concerning.

Defense: You're still concerned?

Juror No. 18: I am.

Defense: Okay.

Juror No. 18: I am.

9 RP 208-09.

Following this second round of voir dire, defense counsel again challenged Juror 18 for cause, arguing that the juror had clearly explained the reasons for her bias, indicating that she felt biased as the mother of two daughters, sitting as a juror on a sex offense case. 10 RP 13-14. Rather than grant the challenge for cause, the court denied the challenge and permitted a third round of voir dire of the same panel of prospective jurors. *Id.* at 29-30, 35-38.

Even in the third round of voir dire, Juror 18 continued to show her concern that she could not be a fair juror on Mr. Hubbard's case. After defense counsel engaged in an exchange with another juror concerning whether he would follow the law or

his emotions, Juror 18 became involved with the questioning:

Defense: That's what we're asking.

Juror No. 18: I understand that, sir, I understand that. But I – I just want to be fair to Mr. Hubbard and I'm concerned.

Defense: Okay.

Juror No. 18: I'm being very honest.

Defense: That's what we want --

Juror No. 18: Please –

Defense: -- We want – at your core, we want brutal honesty.

Juror No. 18: Yes, core, I –

Defense: You don't want to do this?

Juror No. 18: -- I don't think you want me.

10 RP 46 (emphasis added).

For the third time, defense counsel challenged Juror 18 for cause, arguing that Juror 18 had demonstrated her actual bias. 10 RP 96-97. The trial court again denied the cause challenge, despite the fact that Juror 18 had stated that she was, in fact, biased. Id. at 99-100.

One explanation for the trial court's repeated denials of defense counsel's challenges for cause was the court's concern over the small pool of prospective jurors, which it noted frequently

during voir dire. 9 RP 130, 231; 10 RP 27-29, 37. Although the court noted that it was making “an effort to be intellectually honest” about cause challenges, despite its concern over the stated juror shortage, 10 RP 37, the court allowed the pressure to retain jurors to influence its decisions on cause challenges. 9 RP 231-32.

And the last thing that I'm sure counsel are well aware of is that at the moment we have 30 jurors. To impanel two alternates, we would need 30. To impanel one alternate, we would need 27. And if the Court agrees to excuse all five of these [defense-challenged] jurors, we will be at 25 and we will have to call more jurors to this court in order to make sure we have sufficient jurors. There will be new jurors tomorrow. And the Court would anticipate it may have the ability to do that, but other courts will be ahead of us.

9 RP 231-32.

Regardless of the court's repeated denials of each of defense counsel's cause challenges, the trial ultimately was forced to proceed with no alternates. 11 RP 33-43.

c. The remedy is a new trial with an impartial jury.

Where a biased juror sits on the jury, the defendant is denied his Sixth Amendment and article I, sections 3 and 22 rights to a jury trial, and the only remedy is to remand the matter for a new trial. Martinez-Salazar, 528 U.S. at 316; Fire, 142 Wn.2d at 158. In light of the showing of actual bias here, the trial court had no discretion

but to excuse Juror 18 for cause. Otis, 61 Wn. App. at 754.

2. THE TRIAL COURT DENIED MR. HUBBARD HIS
RIGHT TO PRESENT A DEFENSE BY
EXCLUDING RELEVANT EVIDENCE.

a. Mr. Hubbard properly attempted to offer evidence
establishing the alleged victim's bias and motive to lie. Mr.

Hubbard made an extensive offer of proof, detailing prior acts of dishonesty committed by B.M.O., relevant to her bias and motive to lie against Mr. Hubbard concerning the instant charges. 16 RP 36-39, 132-36, 137-39; CP 130. The prior bad acts of B.M.O. were relevant to her credibility, but moreover, B.M.O.'s anger at Mr. Hubbard for being the household disciplinarian was highly relevant to B.M.O.'s motivation for making the allegations in this case.

Defense counsel argued that while B.M.O. had been living with her mother and Mr. Hubbard, she had shoplifted at a number of stores, at times resulting in trespass orders; she had forged Mr. Hubbard's name on forms at her school, resulting in disciplinary action; and she had hacked into the school computer network to cheat on school work, resulting in her suspension from school, among other misdeeds. CP 130. The defense argued that these prior acts, particularly those involving dishonesty, such as the forgery and cheating, were relevant to B.M.O.'s credibility and

veracity as a witness. 16 RP 132. In addition, the acts of dishonesty, particularly the forgery of Mr. Hubbard's own name, were relevant to her motive to fabricate these charges due to her fear of him, her anger at him for "grounding" her in response to her behavior, and her stated desire to get him out of the family home. ER 403(b); ER 608(b); 16 RP 149; 17 RP 27-29.

The court ruled that none of B.M.O.'s prior acts was relevant to her general disposition for untruthfulness, and the probative value as to motive would be substantially outweighed by its potential for prejudice. 17 RP 19-23.

b. The court's exclusion of relevant evidence denied Mr. Hubbard his right to present a defense. The Sixth and Fourteenth Amendments separately and jointly guarantee an accused person the right to a meaningful opportunity to present a defense. Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct 1727, 164 L.Ed.2d 503 (2006); U.S. Const. Amends. VI, XIV. Article I, section 22 of the Washington Constitution provides a similar guarantee. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). A defendant must receive the opportunity to present his version of the facts to the jury so that it may decide "where the truth lies." Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920,

18 L.Ed.2d 1019 (1967); Chambers v. Mississippi, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). “[A]t a minimum, . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt.” Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

The right to offer the testimony of witnesses ... is in plain terms the right to present a defense, the right to present the defendant's version of the facts.... [The accused] has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.”

Washington, 388 U.S. at 19

i. Evidence of B.M.O.'s prior bad acts was relevant. Relevant evidence tends to make a material fact more or less probable. ER 401. Relevant evidence is generally admissible. ER 402. Evidence of the alleged victim's prior acts of dishonesty, particularly those acts for which she was punished by Mr. Hubbard, was plainly relevant.

B.M.O. acknowledged that she was frequently grounded due to her behavior, and that Mr. Hubbard had become the primary disciplinarian in the house. 17 RP 163-64. Due to the trial court's

ruling excluding the ER 608 evidence, however, the jury was left with the impression that B.M.O.'s behavior was typical of a "normal teenage child," and "issues that probably should have been consequenced [sic]." Id. at 163. This was not an accurate rendition of the alleged victim's high school resume, as the trial court was well aware, but due to the court's pre-trial ruling, the jury was left with a completely inaccurate impression of B.M.O.'s delinquency, the reasons for her grounding by Mr. Hubbard, and therefore the context in which she made the accusations of molestation.

Because of the many inconsistencies between B.M.O.'s and her brother Sean's testimony, any matter which undercut the alleged victim's credibility or established bias or motive to lie was relevant. B.M.O. had a strong motivation to make allegations of sexual molestation against Mr. Hubbard – the man whose name she had forged, and the only adult who enforced discipline in her home. B.M.O. knew that by making this allegation, she could make Mr. Hubbard "disappear," and that if she didn't make him disappear soon, he planned to kick her out of the house in a few months, when she turned 18. RP 17 158-59. The fact that the alleged victim had a strong motive to lie and an acknowledged grudge

against the accused was a fact that made her credibility more or less likely.

Bias is a term used in the "common law of evidence" to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest. Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony.

U.S. v. Abel, 469 U.S. 45, 52, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984)

(citations omitted).

B.M.O.'s reputation for dishonesty, as established by her many prior acts of fraud, theft, and deception, was indisputably relevant to her credibility. These acts were also relevant to establish bias and motive to lie, since for each prior act, she was punished by Mr. Hubbard, the same individual about whom she made accusations of sexual misconduct. Because the proffered evidence tended to establish the alleged victim's bias, it was highly relevant and should have been admitted.

ii. Beyond its relevance, the evidence was properly offered under ER 608(b). Under ER 608(b),

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of a crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Evidence of B.M.O.'s prior acts of dishonesty, as well as her anger at Mr. Hubbard due to his role as household disciplinarian, was probative of her untruthfulness, her bias, and her motive to lie. Proof of her prior acts did not rely on extrinsic evidence, as B.M.O. was prepared to admit to her misconduct when she testified to frequent groundings for behavior that should have been "consequenced [sic]." 17 RP 163. It is the scope of her testimony that was limited, however, due to the court's improper exclusion of ER 608(2) and ER 404(b) evidence. In addition, in an offer of proof, the defense made an application under ER 608(b)(2) to offer the testimony of three witnesses who were familiar with B.M.O.'s

character for untruthfulness.⁸ This testimony was excluded by the trial court, although it was not based upon extrinsic evidence and thus was properly offered under ER 608(b).

“Failing to allow cross-examination of a state's witness under ER 608(b) is an abuse of discretion if the witness is crucial and the alleged misconduct constitutes the only available impeachment.” State v. Clarke, 143 Wn.2d 731, 766, 24 P.3d 1006, cert. denied, 534 U.S. 1000 (2001) (citing State v. York, 28 Wn. App. 33, 621 P.2d 784 (1980)). The alleged victim's credibility, her bias, and her motivation to lie were highly relevant to the State's case. The proffered evidence was powerful impeachment evidence. The trial court abused its discretion in excluding it.

iii. The evidence was also properly offered under ER 404(b). The defense properly offered evidence of the alleged victim's prior acts pursuant to ER 404(b). Under ER 404(b),

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

⁸ The defense sought to introduce B.M.O.'s prior acts through Jason Plank, Boyd Speer, and Ms. Cuddihy, B.M.O.'s mother. 7 RP 10-11; 12 RP 6-13. Although Mr. Speer ultimately testified for the defense, the 404(b) evidence was excluded. 18 RP 52-84.

ER 404(b) (emphasis added).

A prior bad act may be introduced against a witness, not to show conformity with that act, but in order to, as here, explain motive. In State v. Cummings, the Court considered whether it was error where a defendant had been impeached with a prior theft from the woman she was on trial for allegedly murdering. 44 Wn. App. 146, 152, 721 P.2d 545 (1986). The Cummings Court found that because the prior theft was introduced not to show the defendant's veracity as a witness, but to show her motivation for being in the home at the time of the murder, it was relevant and admissible under ER 404(b). Id. Here, B.M.O.'s prior acts of dishonesty were relevant to show her motivation for alleging acts of sexual misconduct against her step-father, and it was error not to allow their admission. Id.

More recently, in State v. Jones, the Supreme Court considered a defendant whose consent defense was excluded at his sexual assault trial. 168 Wn.2d at 721. The Jones Court held that for evidence of high probative value, "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." Id. at

720 (quoting State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983)). The Jones Court held that where the trial court had excluded “essential facts of high probative value,” the defendant was “effectively barred ... from presenting his defense,” in violation of the Sixth Amendment. Id. at 721.

c. The trial court’s refusal to admit relevant evidence requires reversal of Mr. Hubbard’s conviction. Because the court’s exclusion of relevant evidence denied Mr. Hubbard his Sixth Amendment right to present a defense, the error requires reversal of Mr. Hubbard’s conviction unless the State can prove beyond a reasonable doubt that it “did not contribute to the verdict obtained.” Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Neder v. U.S., 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); Jones, 168 Wn.2d at 724. The State cannot meet this burden in this case.

There were significant inconsistencies in the accounts told by B.M.O. and by her younger brother Sean, and the incidents of sexual molestation alleged in this case occurred years before they were reported. The alleged victim’s unimpeached testimony lent credence to the State’s theory that Mr. Hubbard was punishing her for no other reason but to isolate her within the home. The jury

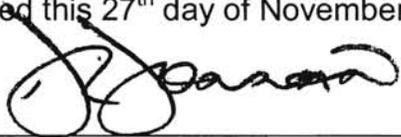
could draw no other conclusion but that Mr. Hubbard had committed the acts of which he was accused. But had evidence of B.M.O.'s many acts of dishonesty, theft, and forgery been presented to the jury, the impact of Sean's testimony would have been greatly reduced. The jury would have been presented with another explanation for B.M.O.'s allegations – the defense theory – that B.M.O. resented Mr. Hubbard for punishing her when she got in trouble at school and with the law, and she knew these allegations would get him out of their home. 17 RP 158-59. The jury clearly had issues with the alleged victim's credibility – after all, they acquitted Mr. Hubbard of two of the three counts – therefore the impact of this evidentiary ruling was profound.

The State cannot prove beyond a reasonable doubt that the exclusion of relevant evidence of bias and motive was harmless. This court must reverse Mr. Hubbard's conviction.

E. CONCLUSION

For the above reasons, Mr. Hubbard respectfully asks this Court to reverse his conviction and grant a new trial.

Respectfully submitted this 27th day of November, 2012.

 (19271) for:

JAN TRASEN – WSBA # 41177
Washington Appellate Project
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 68327-6-I
v.)	
)	
RONALD HUBBARD,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 27TH DAY OF NOVEMBER, 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:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	<input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 27TH DAY OF NOVEMBER, 2012.

x 

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CLERK OF COURT
COURT OF APPEALS
DIVISION ONE
SEATTLE, WA

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