

68914-2

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No. 68914-2-1

In the Court of Appeals of the state of Washington

Division One

State of Washington

Respondent

v.

Sandor Rivera

Appellant

On appeal from the Superior Court of the
State of Washington for King County
The Honorable Cheryl Carey, Judge

2013 JUL -8 PM 2:02
COURT OF APPEALS
STATE OF WASHINGTON
[Signature]

Statement of Additional

Grounds for Review

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I, Sandor Rivera, have received and reviewed the opening brief prepared by my attorney. Summarized in this brief are additional grounds for review that are not addressed in that brief. I understand the court will review this statement of additional grounds for review when my appeal is considered on the merits.

Date June 30, 2013

Sandor Rivera *[Signature]*

CLERK OF SUPERIOR COURT
STATE OF WASHINGTON
JUL - 8 PM 2:02

Table of Contents

A. Grounds for review.....1

 1) False testimony1

 2) Prosecutor misconduct.....4

 3) Err Rule 403 & Rule 4046

 4) Abuse of constitutional rights.....8

 5) Double jeopardy.....10

 6) Judicial Misconduct14

 7) Faulty Jury Instruction15

B. Conclusion.....16

Table of Authorities

	Page
Strickler v. Greene (1999)	2
Brady v. Maryland.....	2
Moore v Holohan (1935)	2
State v. Gregg	
278 NJ. Super. 182,650 A.2d 835.....	5
Portuondo v. Agard (2000)	8
State v. Prater	
30, Wash. App. 512,635 P.2d 1104.....	11
Blockburger v US (1932)	11
State v. Davis	
47 Wn. Ar pp. 91,734 P.2d 500.....	11
Rules, Statues and other Authorities	
RCW, Robbery	
Standard 3-5.6.....	2
Model Rule 3.3.....	4
Standard 3-1.3.....	4
9A. 56.200(1) (A)	11
9A.56.190.....	11
State v. Workman	
66 Wash. 292, 119 P.3d	14
State v. Loehner	
42 Wash. App. 408, 711 P.2d 377	15

1) False testimony

- (a) Is it the state's obligated duty to disclose false testimony when it arises during trial?

During trial testimony of a witness it is the burden of the state to verify the truthfulness of a witness.

Thus due process is violated when a prosecutor engages in questioning a witness during trial, the witness testifies falsely, and the state allows the witness's false testimony to continue without engaging the witness to verify, the statements truthfulness or inquire about the false statement.

- (b) Does a defendant have a constitutionally protected right to rely on the state to follow due process?

It is the state's duty to correct or verify a witness testimony when the testimony of defendant's witness raises contradicted testimony that offers motive for fabrication of the state's witness.

Thus, the state raised an issue of manifest abuse of discretion. By not addressing state witness to engage the state's witness to verify or correct false testimony (see 3RP-1454). The state verified a discrepancy (see 3RP-1467), in which the state abused discretion to not pursue witness in rebuttal, during the presence of the jury.

1) False testimony, Continued

In which the state failed to disclose out-of-court testimony of a witness that was arguably helpful to the defendant, *Strickler v. Greene* (1999). In *Brady v. Maryland*, the prosecutor violated Brady by failing to disclose out-of-court testimony of a witness.

Perjured testimony may not knowingly be used by the Prosecution, *Moore v. Holohan* (1935), and by implication, any material inconsistency in earlier testimony and what the witness intends to say at trial should be disclosed. Further, the Prosecution cannot idly sit by once it knows a witness has testified falsely.

In this case, it is highly possible that the witness testimony of Michael Rannetta, prejudicially influenced the jury's deliberation. Mr. Rannetta's testimony was that Mr. Rivera showed "everyone" newspaper clips of the incident (3RP 981-82, 988-89) and bragged about his actions. Further that Mr. Rivera and Mr. Rannetta did not have an altercation and were on good terms; Mr. Rannetta never went to the hole. In undisclosed out of court testimony, not presented to the jury, 3RP 1467, violated due process, in not seeking testimony to be withdrawn once discovered to be false, (Standard 3-5.6) because of the information not presented to the Jury as to why Mr. Rannetta was moved to Mary East from Mary West to "keep the peace", the Jury must assume no conflict found. However in medical units of the Regional Justice Center (RJC) inmates can't be moved out of the unit and so the "hole" is a 23 hour lock down in the cell. It is this information that is believed to be undisclosed, which would only confirm Mr. Rivera's testimony.

1) False testimony Continued

Thus, for this reason of failure to correct and disclose information to the jury, this court should find that the state error was not harmless and that the state had opportunity to correct the error, in which the jury was able to gain bias opinion without proper disclosure of information. Due to an untruthful witness and all errors included in this Ground for Review this court should reverse and remand for retrial.

2) Prosecutor misconduct

(a) Is it overly prejudicial and unethical that the state would introduce statements, which neither the state witnesses nor defense had made, to play on the fears and emotions of the Jury?

During summation, 3RP 1515,@5-11, the state presented fabricated and intentionally misrepresented facts based on what Mr. Rivera supposedly said during the crime; "I'm going to stop. I'm sorry. Actually, I'm not, slash. I'm going to stop. I'm going to leave. I'm sorry. Wait. I lied, slash."

Defense Attorney Mr. Crowley, addressed the state's misrepresented facts s misleading, 3RP 1562, @ 21-6, "The statements that didn't happen", it is the state's unethical misconduct to intentionally misrepresent facts and to mislead the Jury, standard 3-1.3, Model Rule 3.3.

(b) Is it highly prejudicial for the prosecutor to portray a defendant to be "sick and twisted"?

The state argues in summation, 3RP 1531-34, That Mr. Rivera is "sick and twisted" And in moments of extreme cruelty Mr. Rivera wants to be liked, and "in a sick and twisted" kind of way going to cite the facts.

2) Prosecutor misconduct Continued

It is the prosecutor that must strive to avoid undue influence on the Jury, Standard 3-2.9, Model rule 3.3, when it is a fact that it is for a professional to declare a mental status of "sick and twisted" behavior, to uphold the fairness of trial and to avoid the opinion of the prosecutor. See, state v. Gregg, 278 NJ. Super. 182. Portraying defendant as vile and despicable.

It is due to the unavowed misconduct that prosecutor went beyond the boundaries of the evidence to mislead the jury into a bias opinion rather than misrepresent the evidence. It is because of this abuse, that this court should find that if not for the misconduct, the jury would have not been influenced by the prosecutor's opinion and misrepresentation of facts. This court should reverse all charges and remand for retrial.

3) Err Rule 403 & Rule 404

- a) Is introducing excess of pictures of parties many months prior to the crime of Assault or Robbery relevant to the crime?

In the case of robbery, assault, burglary or intimidating a witness, pictures of parties' months prior to the crime does not prove motive to the crime.

The court used excessive amount of photographic evidence to confuse and waste the court's time. Most importantly the state introduced prejudice photographic evidence to present the careless and irresponsible defendant. (See 3RP 1021, Exhibit 345-A and 345).

- b) Is it inadmissible to use other crimes, wrongs or acts to prove character of a person in order to show action in conformity therewith?

Photographic evidence of marijuana, money, and possible drug operations are irrelevant and an abuse of evidence rules 404, when the photographs are proving to be presenting other wrongs or acts not relating to the crime.

Using photographs to present motives must be objectively presented to ensure a fair trial. During summation, 3RP 1537, the state argues that Mr. Rivera couldn't be "Mr. International", the "true playa hosting wild parties", the state abused evidence to manifest a motive, in which not one witness verified such allegation to a motive.

3) Err Rule 403 & Rule 404, Continued

It is highly possible that the confusion and the time wasted presenting photographic evidence that violate Rule 403 and Rule 404 would have great effect in the outcome of the Jury's verdict. The error in allowing misrepresented MySpace photos to be used to mislead the Jury to gain an inflamed opinion of the defendant may have acted as a major role in the mind of the jury. If not for excessive photographs of parties, drug and alcohol abuse taken prior to the crime, the jury would be forced to come to a verdict based on evidence relevant to the crime and thereafter. Thus the verdict of the Jury would have been greatly affected by the error.

This court should reverse all charges and remand for retrial.

4) Abuse of constitutional rights

a) Is it improper for the states to disclose discovery to the accused, only to present to the jury that the defendant tailored his or her testimony by practicing ones constitutional rights provided by the sixth amendment?

The state presented to the jury during cross examination that Mr. Rivera, 3RP 1298, "Prepared" for his testimony by "studying" and "reading" notes, viewing "police reports", 3RP 1299, and "witness statements."

The state also raised argument during the summation, 3RP 1511, stating that Mr. Rivera, "Practiced and rehearsed, and wanted to make sure he got it right." The state presented an improper argument that inflames prejudice into the mind of the jury.

A prosecutors comment that hearing the testimony of all the other witnesses gave the defendant an advantage to "fit" his testimony into the evidence presented. However, this was not an undue burden on the defendant's sixth amendment right to be present (Portuondo v. Agard, 200). The difference in Mr. Rivera's case , is that the advantage, was not spoken testimony but, "phone records", "police reports" and "witness statements", evidence provided by discovery. The state erred in exploiting such rights provided by the sixth amendment, and misrepresenting the fact that Mr. Rivera prepared his defense.

4) Abuse of Constitutional Rights, Continued

If not for this Abuse of constitutional rights, in exploiting Mr. Rivera, by misrepresenting the facts, the jury would not have based an opinion that the defendant tailored his own testimony due to practicing his right to prepare a defense. The state failed to uphold Mr. Rivera's constitutional right to a fair trial. Due to this abuse of ones right to "prepare" a defense, this court should Reverse and Remand for retrial.

5) Double Jeopardy

- a) Do two offenses constitute a single crime where in order to establish the element of one offence the state must prove a second crime was committed?

The state violated Double Jeopardy in charging Mr. Rivera with Assault and Robbery, both in the first degree, with a special verdict, weapon enhancement on each crime. Due to the facts stated in RCW 9A.56.200 (1)(A) & 9A.56.190- (3RP 1493@9-17)"A person commits the crime of robbery when he or she unlawfully with the intent to commit thereof takes personal property from that person or another against that persons will, by the use of threatened immediate force, violence or fear of injury to the person." Furthermore "force or fear must be used to obtain or retain possession of the property to prevent or overcome resistance to the taking." Assault with a weapon, by force or by means likely to produce great bodily harm or death has the same elements as robbery in the first degree with a deadly weapon, As stated in RCW 9A.56.200(1)(A) & 9A.56.190, 3RP 1493 (@14-17), "the force for fear must be used," "in either of which the degree of force is immaterial." The Assault use to obtain property merges with Robbery.

- b) Is it constitutional that the jury may have only found that one of the attacks occurred, yet utilize one attack to find the defendant guilty of both charges?

5) Double Jeopardy, Continued

The crime in which Mr. Rivera enters "Radio Shack" with the intent to steal property as stated by the state, Mr. Rivera attacks Mr. Gary Cook with the intent to steal inside a Radio Shack store. (State v. Prater, 30 Wash. App. 512,635P.2d 1104). The issue is that with Assault in the first degree, merges into Robbery in the first degree where the act of assault is not a separate distinction from the force required for Robbery.

Due to faulty jury instructions the court must assume that the same act of assault was found by the jury to justify its guilty verdict on both charges.

See State v. Davis, 47 Wn. App. 91,734 P.2d 500. The case, in which Davis attacks Holohan, with a pillow and a knife inside Holohan's home. The Jury instructions given to the jury failed to distinguish between the pillow and the knife on Holohan, since the jury may have only found one of the attacks occurred yet utilized this one attack to find Davis guilty of both charges. The charges must merge.

In the case of Mr. Rivera 10-1-0146-3KNT the state failed to distinguish a separate and distinct act of Assault as a separate act from Robbery. Double Jeopardy applies when a person has been tried and a subsequent charge covers the same conduct, victim and element as the previous charge, Blockburger v. US (1932) Mr. Rivera acted on the same criminal conduct in all charges, with the intent to steal property. The victim and the weapon element is the same in all charges.

5) Double Jeopardy, Continued.

The injury to the victim occurred within the commission of the crime, unable to be separate and distinct. Therefore, the jury may have assumed that the attack was a whole single attack in whole single attack in which the same weapon and the same victim was utilized to find Mr. Rivera guilty of Robbery in the first degree with a deadly weapon enhancement and Assault in the first degree. This court should find, due to the double jeopardy, the charge assault is not a separate crime and must be merged into the Robbery charge.

c) Is it double jeopardy when a lesser included offense completes a greater crime? In which the offence merges?

In the charge of witness intimidation, it is a key role within the elements of Robbery in the first degree. Mr. Gary Cook was intimidated during the commission of the crime, not thereafter. It is an element of Robbery in which it is a must, to enforce fear, in the commission of the crime or of immediate flight therefrom, to prevent or overcome resistance to the taking, or to prevent knowledge of the taking, RCW 9A.56.190.

In this case all elements of each charge is within Robbery, with respect to burglary anti-merger statute, RCW 9A.52.050. This court should in all reverse the charge of assault and witness intimidation, vacate these two charges and remand for resentencing, with the correct charges of the crime, Burglary and Robbery in the first degree.

6) Judicial Misconduct.

- a) Is it the judicial duties of a judge to manifest bias or prejudice conduct? Does a judge who manifest bias or prejudice conduct in a proceeding impair the fairness of the trial? (Rule 2.3)

During sentencing, Judicial Judge Cheryl, clearly expressed she was bias in favor of the state, 3RP 1610, as she “shared” the “states frustration” and in past tense stated; “But I, too, was “extremely disturbed”. When Judge Cheryl, refers to Mr. Cook’s testimony, that in the courts’ opinion, “was an absolute nightmare”, she clearly expressed her sympathy. In sharing the states “frustration”, the court went beyond judicial duties and raised reason to support bias misconduct.

This court may review in further that Mr. Gary Cook testified early in trial proceedings and in bias misconduct the courts’ ruling was influenced, 3RP 227, when defense requested to cross-examine Gary Cook at a later time due to emotions elicited during 911 call played in open court. It was at the time of the 911 call played in open court that a number of the jurors were in “tears”. Clearly to up hold a fair trial with bias or prejudice, the judge should have granted a later time to crass-examine Gary Cook. Misconduct of this nature is greatly prejudicial, if not for the misconduct the jury may have had time to recover emotionally and be clear minded to conduct the duties of the jury to decide the facts based upon the evidence without inflamed emotions. The ruling was intentional and calculated to harm the defense. It is obvious that the emotional

6) Judicial Misconduct, Continued.

Effect of the 911 call was devastating and to continue proceedings was improper.

Thus it is judicial misconduct to which this court should, reverse and vacate charges of an unfair trial that is protected by the constitution under the fifth and fourteenth amendment.

7) Faulty Jury Instructions.

a) In multiple-acts cases where several acts could form basis of one count charged, Either the state must elect the act on which it will rely for conviction or the court must instruct the jury to agree unanimously, beyond a reasonable doubt on a specific criminal act. State v. Workman, 66 Wash. 292, 119 P.3d 751, in certain situations, the right to a unanimous jury. Also includes the right to express jury unanimity on the means by which the defendant is found guilty to have committed the crime. The defendant protected by WPIC 4.25, that is you unanimously agree as to which act or acts have been proved beyond a reasonable doubt and to which means the defendant is found guilty?

In this case Rivera is charged with assault in the first degree and robbery in the first degree. The act of assault is used in both counts to rely on for conviction. The jury instructions fail to provide which act of force the defendant is found guilty of to have committed the crime. Evidence presented at trial provided the jury with evidence of injury to the victim. However, it is because the court failed to instruct the jury as to

7) Faulty Jury Instructions, Continued.

Which act of force is the criminal act for count one and which act of force is for count two. The jury cannot elect which act was basis for liability. In state v. Loehner 42 Wash. App 408, 711 P.2d 377. Trial court erred when it failed either to require state to elect which incident it was relying on or to instruct jury that verdict had to be unanimous as to which incident was basis for liability: error was harm/ess. However, as incidents were so described in testimony that findings as to any one incident would be necessarily be identical to findings on all other instances.

The jury's verdict had not been unanimous as to the means by which the defendant is found guilty on a specific act. Furthermore, as alternative elements of count one, (3) (a) a deadly weapon and count two (5) (a) a deadly weapon, as also stated in charging documents, armed with a deadly weapon. It is because the jury not need be unanimous 3RP 1490-93, that the jury forms the same basis for conviction for multiple count.

The courts failure to instruct the jury to the means by which act or acts the jury must rely on for the conviction of each count, trial court has erred to give proper jury instruction. Due to court error this court should reverse the convictions.

Conclusion

For the reasons stated in this brief, A Statement of Additional Grounds for review, this court should find all charges; Assault, Robbery, and Witness intimidation to be reversed and vacated, due to accumulated error of multiple violations of due process, protected be the Fifth and Fourteenth amendment of the constitution.

For the reasons stated in this brief, Grounds for Review, this court should find all charges to be reversed and remand for retrial, due to multiple error resulting in failure to a fair trial protected by our constitution.

For the reason of double jeopardy stated in this brief, this court should reverse and vacate the charge of assault and witness intimidation, as these charges must merge with robbery. This court should remand for resentencing.

Dated this 30 Day of June 2013

Respectfully submitted,

X  _____

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