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Sep 06, 2016
Court of Appeals
Division I
State of Washington

COA No. 74213-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHRISTINAH BELLAH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF SNOHOMISH COUNTY

The Honorable George N. Bowden

REPLY BRIEF

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A. REPLY ARGUMENT

1. The trial court's restrictions on defense counsel were

improper. The appellant argued in the Opening Brief that the trial court erroneously granted the prosecution's in limine motions to prevent defense counsel Gabriel Rothstein from stating in *voir dire* and opening statement that he represented an innocent defendant, and to prevent counsel from arguing that the role of the jury is to protect the individual from the state. AOB, at pp. 11-21.

The first argument merely states the defense theory of the case – innocence -- and the use of the word “I” does not render that statement improper vouching. As to the second argument, defense counsel made clear he was not seeking to argue jury nullification.

The Court should be wary of arguments such as the prosecution's in limine motions, seeking to circumscribe counsel from proper zealous argument.

a. Innocent defendant. First, the Respondent appears to be arguing generally that any claim by the defense that the defendant is innocent of the charges would be improper because it is contrary to the routine jury instruction, and the legal truth, that a defendant is presumed innocent. BOR, at pp. 16-17. The Respondent's argument seems to be

premised on an assertion that there is no such thing as outright innocence, only a technical presumption thereof.

But the defense statement would not contradict the rule of the presumption of innocence. Rather, as addressed in the Opening Brief, it merely states the defense theory that the defendant will be shown to be completely innocent, by affirmative evidence. AOB, at pp. 14-16. Ms. Bellah relies on those arguments.

Furthermore the State's argument that the defendant was not impaired in his ability to argue his theory of the case is incorrect. The Respondent contends the defense and the right to counsel was not impaired because the attorney could still, after the ruling, argue that the evidence did not prove the case beyond a reasonable doubt.

But that was not Ms. Bellah's first preferred defense theme. Her defense was that she was completely innocent because she was affirmatively told that she had the permission to sell the jewelry to a pawn shop, and she went there and did so unsullied by any wrongful intent or even by ambiguous mental recklessness. The Court's ruling preventing counsel from referring to his client as an innocent defendant impaired her right to defend and her right to have counsel argue in that manner.

This statement or argument would not be vouching. Ms. Bellah argued that the case of State v. Reed is inapplicable to this case, not

because it involves vouching by a prosecutor or because the vouching rules do not bind defense counsel, but because in that case the prosecutor so plainly stated a personal opinion during closing argument, in contrast to this case. AOB, at pp. 13-14 (citing State v. Reed, 102 Wn. 2d 140, 143-46, 684 P.2d 699 (1984)).

Here, in contrast to Reed, the defense attorney did not seek to state a personal belief, but instead the theory of this person's defense. He did not seek to offer a personal opinion or an awareness of some hidden evidence. A defense counsel must be permitted to argue that his or her client is innocent in this proper manner. The mere use of the word "I" does not render the statement vouching. See State v. Robinson, 189 Wn. App. 877, 892, 359 P.3d 874 (2015) (a prosecutor's use of the word "we" amounts to vouching only if it places the prestige of the government behind the witness or suggests that information not presented to the jury supports the witness's testimony).

b. Defense did not seek to argue for jury nullification.

Regarding the defense desired argument that the jury protects citizens from the state, this is a routine argument that is one of many proper characterizations of the Anglo-American judicial system for the jury, and argues the importance of the jury's role in that system.

The record shows that this controversy commenced when the State's pretrial briefing erroneously conflated the argument the defense wished to make with a request to argue for jury nullification. Ms. Bellah's lawyer made clear that he was not seeking to argue for jury nullification. The trial court refused to entertain his explanation that, although he only sought to emphasize to the jury the general protections of the constitutional system, the State's in limine briefing had simply incorrectly stated that the defense was seeking nullification. 2RP 25-26; see CP 80. The defense made clear it would steer clear from any improper argument, but this was not one. See, e.g., United States v. Gilliam, 994 F.2d 97, 101 (2d Cir. 1993) (The founding fathers' efforts at installing protections against government tyranny take their practical form in the jury's reasonable doubt standard).

Notwithstanding the Respondent's claim that the evidence was overwhelming, these errors require reversal in a case where the evidence was highly disputed, including because the defense presented multiple sources of affirmative evidence showing that Ms. Bellah was told she had *permission* to pawn the jewelry.

2. Denial of the continuance and witness travel funds for Judy Brown (Ms. Bellah's mother). Ms. Bellah relies on her arguments in the Opening Brief that the court erroneously denied her motion to continue

trial, and to provide witness travel funds, to present out of state witness Judy Brown, the defendant Ms. Bellah's mother.

It is true that the motions were made essentially on the eve of trial, however, the mother's testimony would not have been cumulative to Ms. Ferguson's similar testimony about hearing Ms. Spencer tell Ms. Bellah she had permission to pawn the jewelry.¹

Ms. Bellah has a right to present relevant evidence, including overcoming procedural obstacles to present a witness for which she has a colorable need. AOB, at pp. 7-8 (citing *inter alia*, State v. Smith, 101 Wn.2d 36, 41, 677 P.2d 100 (1984)). The corroboration provided by multiple witnesses is also important to a defense. As a witness who was not the defendant's niece (like Ms. Ferguson) the defendant's mother would have had a different perspective on the case. These arguments do not require a court to make a credibility assessment of the prospective witness, which appellant agrees would be inappropriate. See Brief of Respondent, at p. 11.

As it turned out, the mother's corroborative testimony at trial was greatly needed, and would not have been cumulative, because it would

¹ Ms. Ferguson's legal name is Latisha Ferguson; she will be referred to solely by her last name.

have blunted the prosecution's impeachment of Ms. Ferguson, the defendant's niece.

Specifically, in cross-examination, the State prosecutor implied that Ferguson's testimony was forgetful or newly imagined. 4RP 308-11 (implying Ferguson's memory was foggy and not clear); 4RP 308 (implying Ferguson was remembering events this way after being asked to testify for the defense). After the defense asked Ferguson if she would lie for Aunt Tina, the prosecutor elicited in further cross-examination that Ferguson's aunt provided her with a place to live, and that she takes care of her. 4RP 306-07.²

Overall, if the continuance or travel funds had been granted, the defendant's mother could have corroborated Ferguson's testimony. Further, the State's impeachment by suggesting that Ms. Ferguson might feel obligated to support the defendant's defense is not a critique that the State could level at the defendant's mother, who lived independently out of Washington.

Additionally, as a result of the State's impeachment of Ferguson, the defense had to spend much of closing argument arguing that Ferguson should be believed. See 4RP 398, 408, 417-18.

² The Appellant's Brief erroneously cited pages in volume three of the transcript; the correct citations appear here. See AOB, at p. 11.

All of this shows harmfulness, an argument that applies to the denial of the continuance, and the denial of funds to fly the witness to Washington (Assignments of Error 1, 2 and 3).

3. Exclusion of Spencer's animal harm conviction. Ms. Bellah relies on the argument in her Opening Brief. Trial counsel's argument below was plainly that evidence that Ms. Spencer was investigated for this incident supported the defense claim that Spencer likely had the jewelry that disappeared in the same incident as the dog, and thus she certainly could have given it to the defendant to sell, just as Ms. Bellah contended. 2RP 30-34. This is the only possible theory of relevance and Ms. Bellah argues that it was adequately communicated to the court below. Sandra Brown's jewelry, and dog Tuffy, both went missing after Brown and Spencer had heated telephone arguments, and Brown came home to the house to find her room and effects ransacked, and jewelry gone. The defense theory of relevance that Spencer was involved in harm to the dog was proffered below, and the relevance of the evidence was established by the circumstances of the case.

Ms. Bellah relies on the arguments of cumulative error that she set forth in her Opening Brief. AOB, at pp. 25-27.

B. CONCLUSION

Based on the foregoing and on her Opening Brief, Christinah Bellah respectfully requests that this Court reverse her trafficking conviction.

DATED this 6 day of September, 2016.

Respectfully submitted,

s/ OLIVER R. DAVIS

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CHRISTINA BELLAH,)	
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF SEPTEMBER, 2016, I CAUSED THE ORIGINAL **REPLY 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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SIGNED IN SEATTLE, WASHINGTON, THIS 6TH DAY OF SEPTEMBER, 2016.



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