

FILED
COURT OF APPEALS

05.18.15 PM 12:45

NO. 34166-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN MOORE,

Appellant.

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

The Honorable Richard Strophy, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural History</u>	1
2. <u>Substantive Facts</u>	2
C. <u>ARGUMENTS</u>	6
1. THE COURT ERRONEOUSLY ALLOWED THE STATE TO IMPEACH COLSTON WITH HER PRIOR STATEMENTS TO POLICE.	6
2. THE TRIAL COURT'S RESTRICTION ON MOORE'S ABILITY TO CROSS EXAMINE COXWELL VIOLATED HIS CONSTITUTIONAL RIGHT TO CONFRONTATION.	10
D. <u>CONCLUSION</u>	16

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Alexander</u> , 52 Wn. App. 897, 765 P.2d 321 (1988)	7
<u>State v. Babich</u> , 68 Wn. App. 438, 842 P.2d 1053, <u>rev. denied</u> , 121 Wn.2d 1015, 854 P.2d 42 (1993)	7
<u>State v. Boast</u> , 87 Wn.2d 447, 553 P.2d 1322 (1976)	11
<u>State v. Bourgeois</u> , 133 Wn.2d 389, 945 P.2d 1120 (1997)	9
<u>State v. Bowen</u> , 48 Wn. App. 187, 738 P.2d 316 (1987)	9
<u>State v. Carlson</u> , 61 Wn. App. 865, 812 P.2d 536 (1991)	6
<u>State v. Carver</u> , 37 Wn. App. 122, 678 P.2d 842 (1984)	11
<u>State v. Dickenson</u> , 48 Wn. App. 457, 740 P.2d 312, <u>rev. denied</u> , 109 Wn.2d 1001 (1987)	6, 8
<u>State v. Hubbard</u> , 103 Wn.2d 570, 693 P.2d 718 (1985)	7

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>WASHINGTON CASES (CONT'D)</u>	
<u>State v. Hudlow</u> , 99 Wn.2d 1, 659 P.2d 514 (1983)	11
<u>State v. Lubers</u> , 81 Wn. App. 614, 915 P.2d 1157, <u>rev. denied</u> , 130 Wn.2d 1008 (1996)	6
<u>State v. Oswald</u> , 62 Wn.2d 118, 381 P.2d 617 (1963)	7
<u>State v. Smith</u> , 148 Wn.2d 122, 59 P.3d 74 (2002)	14
<u>State v. Stamm</u> , 16 Wn. App. 603, 559 P.2d 1, <u>rev. denied</u> , 91 Wn.2d 1013 (1976)	7
<u>State v. Wilson</u> , 60 Wn. App. 887, 808 P.2d 754, <u>rev. denied</u> , 117 Wn.2d 1010, 816 P.2d 1224 (1991)	7
<u>State v. York</u> , 28 Wn. App. 33, 621 P.2d 784 (1980)	12

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

Crawford v. Washington,
541 U.S. 36, 24 S. Ct. 1354,
158 L. Ed. 2d 177 (2004) 11

Davis v. Alaska,
415 U.S. 308, 39 L. Ed. 2d 347,
94 S. Ct. 1105 (1974) 11-13

Delaware v. Van Arsdall,
475 U.S. 680, 89 L. Ed. 2d 674,
106 S. Ct. 1431 (1986) 13

United States v. Silverstein,
737 F.2d 864 (10th Cir. 1984) 7

RULES, STATUTES AND OTHERS

Const. art. 1, § 22 11

ER 403 9

ER 404(b) 9

ER 609 10, 13

ER 613 6

U.S. Const. amend. 6 11-13

A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing the State to impeach a defense witness with prior statements the witness made to police.

2. The trial court erred in limiting appellant's cross examination of the complaining witness.

Issues Pertaining to Assignments of Error

1. Did the trial court err when it allowed the State to present evidence, under the guise of impeaching one of appellant's alibi witnesses, that almost a year after the alleged robbery in this case the witness told police appellant tried to break into her apartment and that she refused to give a statement to police about the incident because she was afraid of appellant's reaction?

2. Was appellant's constitutional right to confront the complaining witness violated where the trial court prohibited appellant from cross examining the witness regarding his pending burglary charge?

B. STATEMENT OF THE CASE

1. Procedural History

On October 6, 2004, the Thurston County Prosecutor charged Kevin Moore with one count of first degree robbery. CP 2. A jury found Moore

guilty as charged and he was sentenced to 102 months based on an offender score of 6. CP 10-18. This timely appeal follows. CP 19-29.

2. Substantive Facts

On June 30, 2004, Mitchell Coxwell contacted Ian McRea to buy some Oxycontin. RP 216-17. Coxwell had met McRea when the two were in juvenile detention together. Id. Coxwell and McRea agreed to meet at truck stop. RP 220-221. Coxwell said he took \$700 with him to buy the drugs from McRea. RP 222.

Coxwell arrived at the truck stop sometime between three and four in the afternoon. RP 221. Coxwell brought his friends Alfredo Garza and Megan Dickinson with him. Id. McRea was already at the truck stop when Coxwell, Garza and Dickinson arrived. RP 87. There was another man with McRea who Coxwell had never met. RP 223. Coxwell identified the other man as Moore. RP 225.

After they arrived, Coxwell got out of his car and spoke to McRea. RP 227. After speaking with McRea, Coxwell said he was not comfortable with the situation so he got back into his car, left some of his \$700 in his car, and then he got into the car McRea and Moore were driving. RP 227-228. The three drove away. RP 229. According to Coxwell, Moore was the driver. RP 229.

Garza testified that when he, Coxwell and Dickinson arrived at the truck stop, Coxwell got into a green Pontiac with McRea and Moore and the three drove off while Garza and Dickinson stayed in Coxwell's car. RP 88-92. Dickinson also testified Coxwell got into a car with McRea and Moore and they drove away. RP 147-150, 155. Neither Dickinson nor Garza testified that Coxwell got back into his car and left some money after initially talking with McRea. Garza also testified Coxwell only had a couple of hundred dollars with him. RP 87.

Coxwell testified that Moore drove a few streets away and parked. McRea then asked Coxwell for his money. RP 231. When Coxwell reached for the car door Moore grabbed his arm and McRea started choking him. RP 231-234. According to Coxwell, McRea took between \$450 and \$550 from him and then McRea and Moore drove off. RP 235. A stranger, who Coxwell said saw the incident, gave Coxwell a ride back to his car. RP 237.

Garza said Coxwell returned about 20 minutes after he left with McRea and Moore. RP 92. Both Garza and Dickinson said Coxwell had marks on his neck and looked like he had been beaten up. RP 93, 152. Dickinson then asked Coxwell to drop her off somewhere before contacting

police because there was a warrant for her arrest. Coxwell eventually called police. RP 153; 239.

Thurston County Deputy Sheriff Carla Carter responded to the call. RP 26. Coxwell told her he had been grabbed around the neck by someone named Ian and Ian had taken \$451.00 from him. RP 30-31. Coxwell also told Carter there was another man involved who Coxwell described as weighing 300 to 350 pounds, with a shaved head and lower chin hair. RP 32.

Coxwell did not tell Carter that the incident occurred while he was trying to buy drugs. RP 239. Instead, he told Carter he had gone to the bank to cash a check when he was robbed. RP 39, 261. Garza also admitted he never told police they went to the truck stop to buy drugs. RP 120. Coxwell only mentioned the drug deal to police a month before trial, which was about the same time police first learned that Dickinson was also in the car with Garza and Coxwell. RP 70, 240. Coxwell testified the reason he finally told police the robbery occurred while he was attempting to buy drugs was because he wanted to "come clean" so that he did not "get in trouble" and that he "felt like it was the right thing to do." RP 241.

Coxwell admitted he was addicted to painkillers at the time of the incident and had taken some percocet earlier. RP 254-255. He also

admitted telling defense counsel that Moore was not driving the car and that he would be "fucked" if he did not testify. RP 263-264.

Police eventually spoke with McRea and put together a photo-montage that included Moore's photograph. RP 53-54. Coxwell identified Moore from the montage as the person driving the car. RP 56, 68.

Police also discovered Moore owned a green Pontiac with a license number similar to the license number described by Coxwell. RP 58. Coxwell later identified the car as the one Moore was driving on June 30. RP 64. On October 7, 2005 police found the car at a business owned by Byron Shaw. RP 61. Shaw testified he received the car from Moore in early June 2004 and he has had exclusive possession of it from the day he received it. RP 169-172, 191. City of Lacy Police Officer Kenneth Kollman, however, said he issued Moore a speeding ticket in August 21, 2004, and Moore was driving the Pontiac. RP 211-213.

Moore's ex-girlfriend, Stephanie Colston, and his friends, Eric Manning, Eric Nevils and Brad Blackburn, testified that on June 30, 2004, Moore was with them at Long Lake. RP 286, 290, 309-310, 326-327, 343, 345. Colston and Nevils testified that Moore arrived at the lake early that afternoon. RP 290, 327. Moore did not leave the lake until sometime after 9:30 p.m. RP 330.

C. ARGUMENTS

1. THE COURT ERRONEOUSLY ALLOWED THE STATE TO IMPEACH COLSTON WITH HER PRIOR STATEMENTS TO POLICE.

On cross examination the State asked Colston if on June 11, 2005, she called police and told them Moore tried to get into her apartment. RP 299-300. Colston said she did not recall. RP 301. In response to another question, Colston said she did not tell police Moore tried to kick down her door that day. RP 301-302.

Over Moore's objection, the court allowed the State to call Thurston County Sheriff's Deputy Ryan Russell to impeach Colston. Russell testified that on June 11, 2005, he was dispatched to Colston's apartment because Moore was trying to get into Colston's apartment. RP 395-396. Russell also testified that Colston declined to give a statement because she was afraid of Moore's reaction if he found out she talked to police. RP 397.

A witness may be impeached with a prior out-of-court statement of a material fact that is inconsistent with his testimony in court. ER 613; State v. Dickenson, 48 Wn. App. 457, 466, 740 P.2d 312, rev. denied, 109 Wn.2d 1001 (1987). Extrinsic evidence relating to collateral matters, however, is inadmissible to contradict a witness. State v. Lubers, 81 Wn. App. 614, 623, 915 P.2d 1157, rev. denied, 130 Wn.2d 1008 (1996); State

v. Carlson, 61 Wn. App. 865, 876, 812 P.2d 536 (1991). Impeaching testimony is collateral if it could not be admitted for any purpose independent of contradiction of the witness. State v. Oswald, 62 Wn.2d 118, 120, 381 P.2d 617 (1963); State v. Alexander, 52 Wn. App. 897, 901-902, 765 P.2d 321 (1988).

In determining whether evidence is collateral, the test is whether it could be offered for any purpose other than attacking the credibility of the witness. State v. Hubbard, 103 Wn.2d 570, 576, 693 P.2d 718 (1985); see also, State v. Stamm, 16 Wn. App. 603, 607, 559 P.2d 1, rev. denied, 91 Wn.2d 1013 (1976) (statements offered in an attempt to impeach credibility on matters "immaterial and collateral to the principle issues presented" were properly refused). "A prosecutor may not use impeachment as a guise for submitting to the jury substantive evidence that is otherwise unavailable." State v. Babich, 68 Wn. App. 438, 444, 842 P.2d 1053, rev. denied, 121 Wn.2d 1015, 854 P.2d 42 (1993) (quoting United States v. Silverstein, 737 F.2d 864, 868 (10th Cir. 1984)).

A trial court's admission or exclusion of evidence is reviewed for an abuse of discretion. See State v. Wilson, 60 Wn. App. 887, 890, 808 P.2d 754, rev. denied, 117 Wn.2d 1010, 816 P.2d 1224 (1991). The court

abused its discretion when it admitted Russell's testimony to impeach Colston.

Dickenson, supra, is an example of impeachment evidence that was not collateral. In Dickenson, identity was the issue in a murder prosecution. The prosecution witness' testimony provided circumstantial evidence that Dickenson was the murderer. Dickenson sought to impeach the witness with her prior inconsistent statement that police officers were the murderers. The trial court excluded the evidence on the basis that it raised a collateral issue. The Dickenson court reversed because the witness' prior inconsistent statement was relevant and admissible on the issue of identity. Dickenson, 48 Wn. App. at 468-69.

Here, the court abused its discretion when it admitted Russell's testimony that on June 11, 2005, a year after the robbery, Colston said that Moore tried to break into her apartment and that she was afraid to make a statement to police. Those facts were irrelevant for purposes other than contradicting Colston's testimony at trial that on June 11, 2005, she did not talk to police about Moore. Thus, the evidence was immaterial and collateral to any issues in the case and not admissible.

Moreover, even if the evidence was probative of Colston's credibility, its value was substantially outweighed by its potential for unfair

prejudice. ER 403. 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. ER 404(b). The evidence may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b).

The evidence that a year after the incident Moore tried to break into Colston's apartment and she was afraid to give a statement to police was prior bad act evidence and not admissible under any exception to ER 404(b). The admission of the evidence allowed the jury to infer that Moore was a violent person, therefore he likely committed this violent offense in conformity with his character. Because the evidence was inadmissible character evidence that painted Moore as a violent person, its probative value as impeachment evidence was substantially outweighed by its potential for unfair prejudice and was a guise for submitting to the jury evidence that was otherwise inadmissible character evidence.

Evidentiary errors are not harmless when there is a reasonable probability the outcome of the trial would have been different had the error not occurred. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997); State v. Bowen, 48 Wn. App. 187, 190, 738 P.2d 316 (1987).

Moore was accused of injuring Coxwell in order to rob him. Evidence that allowed the jury to infer Moore was a violent person likely led the jury to discount his alibi evidence and conclude that he must have been the person in the car with McRea. Thus, there is a reasonable probability the outcome of the trial would have been different if Russell's testimony had not been admitted.

2. THE TRIAL COURT'S RESTRICTION ON MOORE'S ABILITY TO CROSS EXAMINE COXWELL VIOLATED HIS CONSTITUTIONAL RIGHT TO CONFRONTATION.

The State moved to prohibit Moore from eliciting testimony that Coxwell had a pending burglary charge. CP 9. Moore argued that evidence of the pending burglary charge was relevant to Coxwell's bias and credibility. RP 242-243. Moore pointed out that after Coxwell had been charged with the burglary he told police he was afraid he would be killed if he testified in Moore's trial and he wanted a deal on the burglary charge in exchange for his testimony. *Id.* The court granted the State's motion finding the evidence was not admissible under ER 609, had little or no relevancy on the issue of Coxwell's credibility and it had the potential for "unfair prejudice." RP 248-249, 252.

Coxwell was a being prosecuted for first degree burglary. Although there was no agreement between the State and Coxwell regarding the

burglary case, Coxwell could not help but be aware that the same prosecutor's office which wanted Moore's conviction was handling his burglary case. Thus, Coxwell had a reason lie about Moore's involvement in the robbery in the hope of currying favor with the State on his pending burglary charge. Unfortunately, defense counsel was expressly forbidden to ask Coxwell anything about the burglary charge, or otherwise to inform the jury about this pending case.

The Sixth Amendment to the United States Constitution and Washington Const. art. 1, § 22 guarantee a criminal defendant the right to present testimony in his own defense and the right to confront and cross examine the witnesses against him. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983); Davis v. Alaska, 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105, 1110 (1974). The right to confront and cross examine cannot be restricted absent a demonstration by the state that there is a compelling state interest more important to the truth-finding process than the curtailment of the defendant's confrontation rights. Hudlow, 99 Wn.2d at 16; State v. Boast, 87 Wn.2d 447, 453, 553 P.2d 1322 (1976); State v. Carver, 37 Wn. App. 122, 124, 678 P.2d 842 (1984).

Moreover, confrontation is a fundamental "bedrock" protection in a criminal case. Crawford v. Washington, 541 U.S. 36, 24 S. Ct. 1354,

1359, 158 L. Ed. 2d 177 (2004); see, Davis v. Alaska, 415 U.S. at 315 ("Cross examination is the principal means by which the believability of a witness and the truth of his testimony are tested."). Because cross examination is so integral to the adversarial process, "a criminal defendant is given extra latitude in cross examination to show motive or credibility, especially when the particular prosecution witness is essential to the State's case." State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1980). When a court prohibits a defendant's cross examination of a witness to establish the witness's bias, credibility, prejudice, or hostility it may violate the defendant's Sixth Amendment confrontation rights. Davis, 94 S. Ct. at 1110.

In Davis, Davis was convicted of burglary and grand larceny for stealing a safe from a bar. One of the state's key witnesses was a juvenile who was on probation for a previous burglary conviction. Davis, 94 S. Ct. at 1107. Based on a state statute, which prohibited the use of juvenile dispositions in other court proceedings, the trial court granted the state's request for a protective order preventing defense counsel from cross examining the witness about his probationary status. Davis, 94 S. Ct. at 1108-1109.

Davis appealed noting that he did not seek to use the juvenile conviction as a general impeachment of the witness' character, but rather to show that the witness may have testified as he did out of fear or concern of possible jeopardy to his probation. Davis, 94 S. Ct. at 1108. The United States Supreme Court agreed holding, "[t]he partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony." Davis, 94 S. Ct. at 1110.

The Court also held that Davis' Sixth Amendment confrontation rights were violated by the court's improper restrictions on defense counsel's cross examination. Davis, 94 S. Ct. at 1111. In doing so, the Court rejected the state's argument that its interest in preserving the anonymity of juvenile offenders outweighed the defendant's right to cross examine the witness about his possible bias. 94 S. Ct. at 1112. The Court has since affirmed the reasoning in Davis. Delaware v. Van Arsdall, 475 U.S. 680, 89 L. Ed. 2d 674, 106 S. Ct. 1431, 1435 (1986).

Here, the trial court erroneously focused on the fact that Moore had not yet been convicted of the burglary and therefore held the evidence was not admissible under ER 609 and was irrelevant. Coxwell, however, had a motive to lie about Moore's involvement in robbery to help the State

secure Moore's conviction and then use his cooperation to attempt to get a deal from the State on his pending burglary charge. Evidence of the pending charge was relevant because it established Coxwell's bias in favor of the State and demonstrated his motive to give testimony favorable to the state. Moreover, this is not a case where the State had any substantial interest in suppressing evidence that Moore had been charged with burglary.

Evidence of the pending Burglary charge should have been admitted, and the court's refusal to allow defense counsel to cross examine Coxwell on this important issue violated Moore's right to confront the witnesses against him.

Constitutional error that violates the right to confrontation requires reversal unless the state shows beyond a reasonable doubt that a reasonable jury would have reached the same result. State v. Smith, 148 Wn.2d 122, 138-139, 59 P.3d 74 (2002). The error here was not harmless.

Coxwell's testimony was important to the State's case. He identified Moore as the person who not only drove the car but was also the person who grabbed him. Coxwell was the only person involved in the robbery. The other two witnesses, Garza and Dickenson, although they identified Moore as the car's driver, were impeached and Garza, like Coxwell, admitted he lied to police. RP 121. Dickenson left before police arrived

and was unable to identify Moore from the montage. RP 152-154. Thus, Coxwell's testimony was critical.

Although Moore was permitted to attack Coxwell's credibility with evidence of a prior possession of stolen property conviction, the evidence of his pending burglary charge was substantively different since it demonstrated an immediate and ongoing bias in favor of the State. Even though there was no agreement with the State regarding the burglary, it is likely that Coxwell believed he could curry some favor with the prosecutor's office by testifying in a way that would help to convict Moore. Evidence of the pending burglary charge was not cumulative. The extent of the cross examination permitted by the court did not alleviate the harm caused by the improper restriction on counsel's ability to explore the reasons for Coxwell's ongoing bias and motive to secure a conviction for the State.

Finally, the State's case was not particularly strong. Moore presented several alibi witnesses and Shaw testified Moore had given him Moore's car prior to the robbery. On the other hand, two of the State's witnesses, Garza and Coxwell admitted they initially lied to police and Coxwell admitted he lied to defense counsel.

In sum, the trial court improperly curtailed defense Moore's cross examination of a critical state witness, and in doing so, it violated Moore's constitutional rights to confrontation and cross examination and the violation was not harmless.

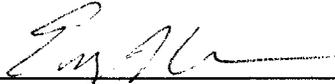
D. CONCLUSION

For the above reasons, Moore's conviction should be reversed.

DATED this 17 day of July, 2006.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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Respondent,)	
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v.)	COA NO. 34166-2-II
)	
KEVIN MOORE,)	
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Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 18TH DAY OF JULY, 2006, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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 PROSECUTOR'S OFFICE
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SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF JULY, 2006.

x 