

NO. 35630-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

SAQUARRA ST. MARIE SMITH,

Appellant.

STATE OF WASHINGTON
BY DEPUTY
GRIFFITH
10/11/07
10/11/07

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

The Honorable Stephanie A. Arend, Judge

OPENING BRIEF OF APPELLANT

RITA J. GRIFFITH
Attorney for Appellant

1305 N.E. 45th Street, #205
Seattle, WA 98105
(206) 547-1742

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in limiting Ms. Smith's cross-examination of Tiffany Osborne to establish her motive and bias in testifying.

2. The trial court's limitation of cross-examination denied Ms. Smith her state and federal constitutional right to confrontation of witnesses.

3. Detective Miller's testimony that he had developed probable cause for an arrest was an impermissible opinion as to guilt and improperly suggested that the facts had been reviewed by the prosecutor or a court and found sufficient.

4. Detective Miller's testimony that he had developed probable cause to arrest Ms. Smith denied her her state and federal constitutional right to a fair and impartial jury.

5. Detective Miller's testimony that he checked Ms. Smith's criminal history constituted improper and inadmissible ER 404(b) evidence.

6. The prosecutor's characterization of Ms. Smith's actions as an assault was improper opinion testimony as to guilt.

7. The prosecutor's characterization of Ms. Smith's action as an assault denied her her state

and federal constitutional rights to a fair and impartial jury.

8. Cumulative error denied Ms. Smith a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court's exclusion of evidence that a state's witness, as part of her plea agreement, had to testify against another defendant in a case in which her own conduct could subject her to criminal liability deny Ms. Smith her state and federal constitutional right to confront the witnesses against her?

2. Was the testimony by the case detective that he had determined that there was probable cause to arrest Ms. Smith, and that he provided the documents of his investigation to the prosecutor and she was arrested, tantamount to his opinion that Ms. Smith was guilty of the crime and a denial of her state and federal constitutional right to a fair and impartial jury?

3. Was the testimony by the case detective that he had looked at Ms. Smith's criminal history to see if there was anything consistent with the

allegations he was investigating improper ER 404(b) evidence?

4. Was the prosecutor's characterization of Ms. Smith's conduct as an assault and improper opinion of her guilt and a denial of her state and federal constitutional right to a fair and impartial jury?

5. Did cumulative error deny Ms. Smith a fair trial?

C. STATEMENT OF THE CASE

1. Procedural history

The Pierce County Prosecutor's office charged Saquarra Smith, along with a co-defendant Tiffany Osborne, with first degree assault while armed with a deadly weapon. CP 1-3. Ms. Osborne entered a plea of guilty to second degree assault prior to Ms. Smith's trial, pursuant to a plea bargain in which she agreed to testify against Ms. Smith. RP 269.¹

A jury convicted Ms. Smith, as charged, after trial before the Honorable Stephanie A. Arend. CP 68-69. On November 22, 2006, Judge Arend entered

¹ The trial transcripts are in four consecutively-numbered volumes which are designated RP. The pretrial hearings are designated RP(pretrial) and the sentencing hearing is designated RP(sent).

judgment and sentence, sentencing Ms. Smith to a term within the standard range. CP 74-85. Ms. Smith subsequently filed a timely notice of appeal. CP 86-99.

2. Trial testimony

The evidence at trial consisted of three versions of what happened during the alleged assault: (a) the taped statement of Ms. Smith; (b) the testimony of complaining witness Nacole Naquin; and (c) the testimony of Tiffany Osborne, who had entered a plea in exchange for her testimony.

In her taped statement, Ms. Smith candidly told the case detective, Gene Miller, that on July 11, 2004, she sought out Nacole Naquin to confront Ms. Naquin for taking \$2000 from Ms. Smith's house. Exhibit 24.² Ms. Smith was with her friends Tiffany Osborne, Kyel and Leona. Ms. Smith believed that Nacole stole her money because Ms. Smith's neighbor told her that she had seen Nacole climb over her side fence; Ms. Smith's window had been broken and Nacole's hand was bandaged; and Nacole's boyfriend

² The entire account presented here was from the stated statement which was played for the court. Exhibit 24; transcript of the statement, Exhibit 25; microcassette of the statement, Exhibit 27.

had new gold teeth, new clothes and a new engine for his car.

Ms. Smith also candidly told the police that her friends kept telling her she needed "to do something about it," and she decided that she would. She and her friends picked up Nacole; Nacole thought they were all going to hang out at Kyel's cousin's house. Once at the house, Ms. Smith told Nacole that they would fight by hitting each other in the face. Nacole reluctantly agreed to this, but then got a bat that was there and started hitting Ms. Smith with it. Tiffany picked up Nacole and threw her on the bed and hit her with a chair. Ms. Smith took the bat and hit Nacole on each shoulder and her chin. Because Ms. Smith was not hitting Nacole hard, Tiffany took the bat and hit Nacole a number of times. After Tiffany hit Nacole again with the chair, Ms. Smith--who had been in and out of the room while Tiffany was fighting with Nacole -- intervened. One of Ms. Smith's friends helped Nacole out of the house.

Based on this statement and the testimony of Nacole Naquin, the defense theory of the case was that Ms. Smith was likely guilty of second degree

assault, but not first degree assault, because she did not have the intent to inflict great bodily harm. RP 360-361.

Nacole confirmed that on July 11, 2004, she went with Ms. Smith, Kyel and someone she knew of as "Shy," thinking that they were just going to "hang out" at Kyel's cousin's house RP 136-137. According to Nacole, when they got to the hall inside the house, Ms. Smith pushed her against the wall and accused her of stealing \$2,000. RP 138. Next, Nacole was pushed face down on the bed in a bedroom off the hall. RP 138-140. While on the bed, Nacole testified, she was hit on the head; she guessed that she was hit with a bat and a chair. RP 141-142. Because she was face down on the bed and had covered her head with her arms and hands, Nacole was unable to testify positively that she was hit with a bat and unable to testify who hit her. RP 143-146, 173-174. She had no memory of Ms. Smith hitting her. RP 177. Kyel eventually let her out a side door. RP 145. Nacole called a friend who took her to the hospital. RP 146.

Nacole recalled that Tiffany removed her shoes and told her to take her clothes off. RP 174-175.

Nacole denied stealing Ms. Smith's money, but agreed that a person she described both as her boyfriend and as not her boyfriend had new gold caps on his teeth. RP 135-136, 150-161.

On cross-examination, Nacole agreed that her jaw was not broken and that she suffered no permanent disfigurement. RP 180. Although she had a metal plate in her hand, she was able to use it without difficulty. RP 182.

The emergency room doctor confirmed that Nacole did not suffer either a broken jaw or broken ribs, and no brain injury. RP 200-202. She had two broken bones in her left hand and one broken bone in her right hand and a cut in her scalp which required sutures. RP 199-200. Nacole was released from the emergency room. RP 228.

Tiffany, who was permitted to enter a plea in juvenile court to second degree assault, rather than first degree assault in adult court, in exchange for her testimony, placed the blame on Ms. Smith. RP 266-267, 269-270. Although Tiffany had not yet been sentenced, her sentence would likely be four years instead of fourteen years. RP 270, 301.

According to Tiffany, Ms. Smith started "choking" Nacole as soon as they entered the house, and both she and Ms. Smith started punching and hitting Nacole after Ms. Smith led Nacole to the bedroom. RP 254-255. Although Tiffany said that she threw a chair at Nacole, she testified that Ms. Smith hit Nacole with a bat until Tiffany took it and put it away. RP 254, 258. In contrast to Nacole, Tiffany said that Nacole was on her back and protecting her face with her hands. RP 258. Tiffany also denied telling Nacole to take her clothes off. RP 316.

On cross examination, the state objected when defense counsel asked Tiffany if she was being investigated for any other problems. RP 301. When defense counsel noted that "[i]t's part of the plea agreement," the court excused the jury. RP 301. Defense counsel stated that the plea agreement included a provision that "she, the witness, will provide truthful information and trial testimony regarding the as-yet unfiled case --" that would suggest an investigation is pending -- "involving a period of time wherein the defendant was prostituting herself." RP 306. Counsel argued that

this went to Tiffany's credibility in that she was testifying to escape criminal liability. RP 309-310.

The trial court granted the state's motion in limine excluding reference to the witness's possible prostitution, and instructed the jury to disregard defense counsel's question and reference to the plea agreement. RP 310-311. The prosecutor indicated that Tiffany had left the state while on conditions of release in the case to go with a pimp to California and had been found beaten up in a motel room. RP 306-307.

While Tiffany was testifying, defense counsel objected to the prosecutor's questions which assumed that an assault had been committed. RP 255. The prosecutor responded that Tiffany had been convicted for assault, and the court overruled the objection. RP 255. The prosecutor then asked Tiffany, "At any point during the assault and the assault that you committed and the defendant is on trial for, was Nacole able to say anything." RP 256.

The prosecutor elicited from Detective Gene Miller that he had "looked at [Ms. Smith's] criminal history, wanted to see if there was in fact some association that was consistent with what I had been

provided because I had been provided a physical description of the residence and information about a boyfriend and that type of thing." RP 76.

The prosecutor also elicited from Detective Miller that "I believed -- I developed probable cause for the arrest of Ms. Smith, and notified our patrol officers of same and documented my investigation at that point forward to the prosecutor's office in an attempt to get a warrant for her arrest." RP 79. Detective Miller then testified that he learned that Ms. Smith had been arrested. RP 80.

D. ARGUMENT

- 1. THE DENIAL OF THE RIGHT TO FULLY CROSS-EXAMINE TIFFANY OSBORNE TO ESTABLISH HER MOTIVE AND BIAS IN TESTIFYING DENIED MS. SMITH HER STATE AND FEDERAL CONSTITUTIONAL RIGHT TO CONFRONT THE WITNESSES AGAINST HER.**

The trial court erred in preventing Ms. Smith from cross-examining Tiffany Osborne to establish her motive and bias in testifying against her at trial. Tiffany's testimony and her credibility was important to the state's case.

Tiffany placed the blame for hitting Nacole Naquin on the head with the bat on Ms. Smith, and described her own actions as taking the bat away

from Ms. Smith. RP 254. In direct contrast, Ms. Smith admitted hitting Nacole, without force, on the shoulder and chin, and identified Tiffany as the person who hit Nacole forcefully on the head. Trial Exhibits 24, 25, and 27. Nacole herself was unable to testify who hit her or even certainly that she was hit with a bat. RP 142-144, 177. Tiffany's testimony was, therefore, critical to the state's case for first degree assault. The state might well not have gone forward on the first degree charge without her testimony; Nacole testified that she did not know if she was actually hit with a bat and had no memory of Ms. Smith hitting her. RP 174, 177.

Under these circumstances, it was constitutional and reversible error to prevent Ms. Smith from fully exploring Tiffany's motive and bias in testifying favorably to the state. While Tiffany was examined about her plea to second degree assault, this did not inform the jury that Tiffany had left the state in violation of her conditions of release and engaged in criminal conduct while in California. She not only resolved her assault charge in her plea agreement, by testifying favorably to the state, she was likely avoiding

further criminal prosecution and possibly a sanction for violating her conditions of release. This provided a very strong motive for her to testify favorably to the state and to strongly implicate Ms. Smith.³

The Sixth Amendment to the United States Constitution and Const. art. 1, § 22 guarantee to a criminal defendant the right to confront and cross-examine the witnesses against him to establish their motive and bias. Olden v. Kentucky, 488 U.S. 227, 109 S. Ct. 480, 120 L. Ed. 2d 513 (1988); State v. Dolan, 118 Wn. App. 323, 327-328, 73 P.3d 1011 (2003); State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983).

Generally, the right to confront and cross-examine witnesses cannot be restricted absent a demonstration by the prosecution 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).

³ Tiffany even testified that Ms. Smith told her that it was lucky that Tiffany was there to stop her. RP 266-267.

In particular, exclusion of cross-examination to establish a witness's bias, credibility, prejudice, or hostility may violate the defendant's sixth amendment rights.⁴ "Cross examination to show bias, prejudice or interest is a matter of right." State v. Buss, 76 Wn. App. 780, 787, 887 P.2d 920 (1995).

The confrontation clause may be violated if the defense is not permitted to place specific facts before the jury from which bias or prejudice can be inferred. In State v. Brooks, 25 Wn. App. 550, 552, 611 P.2d 1274 (1980), for example, the court reversed the defendant's conviction where the court allowed cross-examination on the terms of the witness's plea agreement with the state -- including the agreement to dismiss a deadly weapon charge -- but improperly denied the defendant the right to elicit the specific fact that by having the state dismiss the deadly weapon charge, the witness avoided a 5-year mandatory minimum sentence. The court held that the defendant was entitled to

⁴ A witness may be examined as to particular facts tending to show the nature and extent of the hostility. State v. Robbins, 35 Wn.2d 389, 395-96, 213 P.2d 310 (1950); State v. Brooks, 25 Wn. App. 550, 552, 611 P.2d 1274 (1980); State v. Jones, 25 Wn. App. 746, 610 P.2d 934 (1980).

present the specific reasons why the witness might be biased in the particular case. Brooks, at 552.

[T]he court may violate the confrontation clause if it prevents the defense from placing facts before the jury from which . . . bias or prejudice may be inferred. Davis v. Alaska, 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105 (1974). In Davis, the defense sought to question a key witness concerning the fact that he was on probation as a juvenile offender and thus could be under pressure from the police. The trial court disallowed the cross-examination to protect the secrecy of the juvenile record. The Supreme Court reversed, holding that defendant's Sixth Amendment right was violated as he was unable to establish the factual record to argue his bias theory.

State v. Pickens, 27 Wn. App. 97, 100, 615 P.2d 537 (1980) (confrontation rights denied where the defendant was not allowed to cross-examine his brother, a state's witness, on the subject of whether the brother might also be subject to prosecution for incestuous relations with his sisters). See also, State v. Robbins, 35 Wn.2d 389, 395-96, 213 P.2d 310 (1950); State v. Jones, 25 Wn. App. 746, 610 P.2d 934 (1980) (reversible error to exclude the testimony of two defense witnesses that the state's officer witness threatened to "fry" the defendant).

Davis v. Alaska stands for the proposition that motive and bias may arise from situations where there is inherent bias and that no formal promises or agreements have been made. Similarly, in State v. Roberts, 25 Wn. App. 830, 611 P.2d 1297 (1980), the court reversed the defendant's conviction where the trial court excluded evidence that one of the young girls who testified as a state's witness had been physically disciplined for failing to keep an appointment with the prosecutor. The Roberts court held that the evidence was relevant to possible pressure on the witness from her parents to cooperate with the state and exclusion of the evidence denied the defendant his right to confrontation. As in Davis, no formal agreement existed between the state and the witness in Roberts.

Here, the trial court denied Ms. Smith her state and federal constitutional right to confrontation of Tiffany Osborne. Ms. Smith was entitled to fully explore the details of Tiffany's plea bargain and the benefits she was receiving in exchange for her testimony. Given the importance of credibility in the case, the error should require

reversal of Ms. Smith's conviction and a remand for retrial.

2. DETECTIVE MILLER'S TESTIMONY THAT HE BELIEVED HE HAD PROBABLE CAUSE TO ARREST MS. SMITH AND SUBMITTED HIS REQUEST FOR A WARRANT TO THE PROSECUTOR, FOLLOWED BY HIS TESTIMONY THAT SHE WAS ARRESTED, DENIED MS. SMITH HER STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR AND IMPARTIAL JURY.

Detective Miller improperly testified that he believed he had developed probable cause to arrest Ms. Smith, that he had notified patrol and had submitted his documented investigation to the prosecutor for the warrant, and that he subsequently learned that Ms. Smith had been arrested. RP 79.

The error in Detective Miller's testimony is akin to the error identified by the court in State v. Stith, 71 Wn. App. 14, 22, 856 P.2d 415 (1993). In Stith, the prosecutor told the jury of the court's prior determination of probable cause. On appeal, the court held that this was "tantamount to arguing that guilt had already been determined." Stith, 71 Wn. App. at 22.

Reviewing courts have, in fact, consistently held that it is error to suggest in any manner that a court has independently determined the truth of a witness's testimony or the sufficiency of the

evidence. See e.g., United States v. Sullivan, 919 F.2d 1403, 1424 (10th Cir. 1990) (implication that the court would have dismissed the charge if the evidence was insufficient was "highly improper").

Here, the only purpose of Detective Miller's testimony was to convey to the jury the detective's opinion that based on his investigation, Ms. Smith had committed the crime. As background for his testimony about Ms. Smith's taped statement, Detective Miller need only have testified that he interviewed her after learning of her arrest or simply that he interviewed her at police headquarters about the allegations. Neither the police investigation nor Ms. Smith's arrest had been challenged as improper.

Particularly in this case, where the jury was comparing the credibility of Ms. Smith and Tiffany Osborne and where none of the other people at the scene testified, the testimony of the lead detective that he had developed probable cause to arrest Ms. Smith was a comment on her guilt and unfairly prejudicial. This was improper opinion testimony as to guilt and a denial of the right to a fair and

impartial jury as guaranteed by the Sixth Amendment and Const. art. 1, § 22.

"No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987) (testimony that the victim fit a rape trauma profile constituted impermissible opinion as to the defendant's guilt). As noted in State v. Sanders, 66 Wn. App. 380, 387, 832 P.2d 1326 (1992), "Such an opinion violates the defendant's right to a trial by an impartial jury and her right to have the jury make an independent evaluation of the facts." (citing State v. Wilber, 55 Wn. App. 294, 777 P.2d 36 (1989)).

A challenge to this impermissible opinion testimony can be raised for the first time on appeal where it is a manifest constitutional error that has "practical and identifiable consequences in the trial of the case." State v. Florczak, 76 Wn. App. 55, 73-74, 882 P.2d 199 (1994) (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

Here, Detective Miller's testimony that he had determined probable cause for Ms. Smith's arrest was tantamount to telling the jury that, as a result of

his investigation, he had concluded that Ms. Smith had committed a crime for which she should be arrested. This was constitutional error and reversible error given that credibility was key to the jury's consideration. For that reason Ms. Smith's conviction should be reversed and her case remanded for retrial.

3. THE PROSECUTOR'S QUESTION WHICH REFERRED TO THE ASSAULT WITH WHICH MS. SMITH WAS CHARGED DENIED MS. SMITH HER STATE AND FEDERAL CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY AND CONSTITUTED AN IMPROPER OPINION AS TO HER GUILT.

While Tiffany was testifying, defense counsel objected to the prosecutor's references to an assault. RP 255. The prosecutor responded that Tiffany had been convicted of assault, and the court overruled the objection. RP 255. The prosecutor then asked Tiffany, "At any point during the assault and the assault that you committed and the defendant is on trial for, was Nacole able to say anything?" RP 256. This improperly conveyed to the jury, the prosecutor's personal opinion that Ms. Smith had committed the assault with which she was charged.

This was misconduct and, as set out in subsection 2 above, a denial of Ms. Smith's state

and federal constitutional rights to a fair and impartial trial.

4. DETECTIVE MILLER'S REFERENCE TO MS. SMITH'S CRIMINAL HISTORY WAS IMPROPER ER 404(B) EVIDENCE.

The prosecutor elicited from Detective Miller that he had "looked at [Ms. Smith's] criminal history, wanted to see if there was in fact some association that was consistent with what I had been provided because I had been provided a physical description of the residence and information about a boyfriend and that type of thing." RP 76.

Detective Miller's reference to Ms. Smith's criminal history, particularly in the context of a montage assembled by the King County Regional Justice Center (RP 76, 78), improperly conveyed to the jurors that Ms. Smith had criminal history and that Ms. Smith might have been acting consistently in committing the charged crime.⁵

This was improper testimony under ER 404(b) because it implied that Ms. Smith had, at the least, been associated with or investigated for criminal activity in the past.

⁵ Ms. Smith had no prior convictions. CP 74-85.

ER 404(b), provides:

(b) Other Crimes, Wrongs, or Acts.

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.

Under ER 404(b), prior bad acts are never admissible to show that a defendant is a "criminal type" who is therefore more likely to have committed the crime charged, nor is it admissible to prove the character of a person to show that he or she acted in conformity therewith during the alleged crime. State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487, 489 (1995).

In deciding whether evidence is admissible under ER 404(b) for some purpose other than to show bad character, the trial court must first determine whether the alleged misconduct has been proven by a preponderance of the evidence. State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981). If there is sufficient proof, then the court must follow a three-part analysis: First, the court must identify the purpose for which the evidence will be admitted. State v. Salterelli, 98 Wn.2d 358, 361-362, 655 P.2d

697 (1982). Second, the evidence must be materially relevant, under ER 401 and ER 402, and necessary to prove an essential ingredient of the crime charged. Salterelli, at 361-362. For this second condition to be satisfied, the purpose for admitting the evidence must be of consequence to the action and make the existence of the identified fact more probable. State v. Dennison, 115 Wn.2d 609, 628, 801 P.2d 193 (1990). Third, pursuant to ER 403, the court must balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the finder of fact. Salterelli, 98 Wn.2d at 362-366.

"Because substantial prejudicial effect is inherent in ER 404(b) evidence, uncharged offenses are admissible only if they have substantial probative value." Lough, 125 Wn.2d at 863. Doubtful cases should be resolved in favor of the defendant. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Here, of course, there was no actual allegation of relevant prior bad acts; Ms. Smith had no prior convictions for her offender score at sentencing. CP 74-85. Instead, there was testimony which

planted in the jurors' minds that Ms. Smith had past criminal activity which Detective Miller investigated and which enabled another jurisdiction to prepare a photo montage with her picture. This was improper and unfairly prejudicial.

Although defense counsel did not object to Detective Miller's statement, defense counsel could not have anticipated his testimony. When the state intends to introduce 404(b) evidence or to impeach with a prior conviction, it must seek admission from the trial court prior to introducing it. After the unanticipated statement had been made, there was nothing that could remove the prejudice of the statement from the minds of the jurors. See State v. Escalona, 49 Wn. App. 251, 742 P.2d 190 (1987).

In Escalona, the court reversed a conviction for second degree assault with a deadly weapon based on an inadvertent statement indicating that the defendant had been convicted of a prior crime involving a stabbing. The Court reversed even though the trial court struck the statement and instructed the jury to disregard it. The Escalona court noted that a prior conviction for having "stabbed someone" was inherently prejudicial and of

the type likely to impress. It was likely to impress because it was logically if not legally relevant to the issue of whether the defendant committed a similar crime. Similarly, in State v. Wilburn, 51 Wn. App. 832, 755 P.2d 842 (1988), the court reversed a conviction based on a reference to the defendant's prior criminal act, in violation of a motion in limine. The court held that such an error cannot be cured by an instruction where the defendant's credibility is a central issue in the case.

Here, Detective Miller clearly conveyed to jurors that Ms. Miller had prior criminal history. This was improper and unfairly prejudicial. Her conviction should be reversed and remanded for retrial.

5. CUMULATIVE ERROR DENIED MS. SMITH A FAIR TRIAL.

It is well settled that the combined effects of error may require a new trial, even when those errors individually might not require reversal. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); United States v. Preciado-Cordobas, 981 F.2d 1206, 1215 n.8 (11th Cir. 1993). Reversal is required where the cumulative effect of several

errors is so prejudicial as to deny the defendant a fair trial. Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992); United States v. Pearson, 746 F. 2d 789, 796 (11th Cir. 1984).

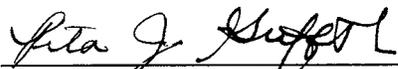
Here, the jury was presented with three versions of the incident; the jurors necessarily had to weigh the relative credibility of each version. Under these circumstances, the improper limitation on cross-examination, the improper opinion testimony as to guilt by both the case detective and the prosecutor, and the improper ER 404(b) evidence individually and certainly cumulatively denied Ms. Smith a fair trial. Her conviction should be reversed and her case remanded for retrial.

E. CONCLUSION

Appellant respectfully submits that her conviction and sentence enhancement should be reversed and her case remanded for retrial.

DATED this 7th day of March, 2007.

Respectfully submitted,



RITA J. GRIFFITH
WSBA No. 14360
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 7th day of March, 2007, I caused a true and correct copy of Opening Brief of Appellant to be served on the following via prepaid first class mail:

Counsel for the Respondent:
Kathleen Proctor
Office of Prosecuting Attorney
930 Tacoma Ave. S., Rm. 946
Tacoma, Washington 98402-2171

Saugarra St. Marie Smith
DOC # 300903
Washington Corrections Center for Women
9601 Bujacich Road
Gig Harbor, WA 98335-0017

Rita J. Griffith 3/7/07
Rita J. Griffith DATE at Seattle, WA

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