

Original

No. 36088-8-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

Nikki Wilson, Appellant,

v.

Lawrence Frye, Guy Casey, and Gil Corporation
d.b.a. Friendly Duck Restaurant, Respondents.

v.

Pamela Peterson, Appellant,

v.

Lawrence Frye, Guy Casey, and Gil Corporation
d.b.a. Friendly Duck Restaurant, Respondents.

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DIVISION II
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STATE OF WASHINGTON
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REPLY BRIEF OF APPELLANTS

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A. Summary of Reply Argument

1. Fabish doesn't contest Wilson and Peterson's position that the videotape in question was evidence of a crime within the meaning of RCW 9A.72.150

Public policy as set forth in RCW 9A.72.150 concerns a matter of public importance, therefore the appellate court may exercise its discretion to review this issue on appeal, even if it was not raised before the trial court.

2. Fabish does not contend that the trial court indicated that further objections would be required when it issued its ruling on Wilson and Peterson's pretrial motion

The trial court's ruling on Wilson and Peterson's pretrial motion was final. It was not necessary for them to renew the objection at trial, since a standing objection existed.

3. Fabish does not seek to distinguish **Unigard v. Lakewood**

Given the absence of any rebuttal to Wilson and Peterson's argument as set forth in their opening brief pages 20 – 25, they request that the Court adopt the analysis set forth in **Unigard Security Insurance Company v. Lakewood Engineering & Manufacturing Corporation**, 982 F.2d 363 (9th Cir. 1992) as a basis for excluding the videotape.

4. Fabish misapplies the use of the Invited Error Doctrine

The use of preemptive testimony is a trial tactic long endorsed in Washington. Wilson and Peterson's use of Kim's videotape in an attempt to minimize its effects does not preclude them from raising the issue on appeal.

5. Fabish incorrectly asserts that Dickens modified his objections to Blackburn's questioning of Wilson and Peterson

Dickens repeatedly objected to the trial court allowing Blackburn to question Wilson or Peterson about specific instances of conduct that weren't relevant to the bar fight.

B. Argument

1. Public policy as set forth in RCW 9A.72.150 concerns a matter of public importance, therefore the Court should exercise its discretion to hear the issue presented.

The public policy underpinnings of RCW 9A.72.150 are set forth in section 110, Destroying Evidence of the Washington Session Laws as follows:

Every person who, with intent to conceal the commission of any felony, or to protect or conceal the identity of any person committing the same, or with intent to delay or hinder the administration of the law or to prevent the production thereof at any time, in any court or before any officer, tribunal, judge, or magistrate, shall willfully destroy, alter, erase, obliterate, conceal any book, paper, record, writing, instrument or thing,

shall be guilty of a gross misdemeanor.

1909 Wash. Sess. Laws 922.

Fabish concedes in his argument that Kim had exclusive control over the complete videotape, and that he intentionally selected a particular section of the videotape for preservation, and decided to allow the remainder of the tape to be erased after preserving it for four days. And he doesn't contest Wilson and Peterson's position that the videotape was evidence that recorded the commission of a crime. Under these facts we believe the only reasonable conclusion one can come to is that Kim voluntarily and intentionally destroyed, altered, or erased evidence rather than provide it to the police.

In **State v. Lee**, 96 Wn.App. 336, 338, n.4, 979 P.2d 458 (1999), Division Two held that an appellate court has discretion under RAP 2.5(a) to review, in the interests of justice, issues of public importance that are not raised at trial.

In September 1995, Lee was charged with assault in the fourth degree based upon allegations of domestic violence. The jury found Lee not guilty. The district court awarded him a monetary award under RCW 9A.16.110 and taxed 12 percent post judgment interest on the award.

The State appealed the award. Lee argued that the State raised an issue on appeal that it did not raise in the lower courts. Division Two decided to review the issue on appeal, even though the Court agreed that the State had not raised its objections in the lower courts. Likewise, Wilson and Peterson contend the preservation of evidence of the commission of criminal activity is an even stronger issue of public importance than the one supporting review in **State v. Lee**.

Finally with regard to this issue, in **Greer v. N.W. National Insurance**, 36 Wn.App. 330, 674 P.2d 1257 (1984), Greer contended on appeal that the exclusionary clause in issue violated public policy and, therefore, had to be stricken from the insurance contract. This theory was first raised during oral argument, even so the Court considered it stating:

“Courts are created to ascertain the facts in a controversy and to determine the rights of the parties according to justice. Courts should not be confined by the issues framed or theories advanced by the parties if the parties ignore the mandate of a statute or an established precedent.”

2. The trial court’s ruling on Wilson and Peterson’s pretrial motion was final.

In **State v. Kelly**, 102 Wn.2d 188, 193, 685 P.2d 564 (1984), Ivy Gail Kelly was convicted of second degree murder. She appealed her

conviction. The State did not object, at trial or on appeal, to expert testimony on the applicability of the “battered woman syndrome” as explanatory of petitioner’s actions under a claim of self-defense. The issue before the court was whether evidence of petitioner’s alleged prior aggressive acts was properly admissible to rebut such expert testimony. The court held it was not.

As part of its rebuttal case, the State made an offer of proof that one witness would testify Kelly accused him of trespass and threatened to injure him.

A further offer was made that a second witness, Ms. Penhollow, would testify she observed Ms. Kelly pounding on the back door of the Kelly’s home with a shovel while Mr. Kelly was inside. Further, it was asserted that Ms. Kelly was verbally abusive toward Ms. Penhollow.

Defense counsel moved in limine to exclude the testimony of both rebuttal witnesses. At the close of the defense case, the trial judge heard argument on the motion and denied it.

Subsequently, the State’s two rebuttal witnesses testified in conformance with the previous offer of proof, without further defense objection. The jury convicted Ms. Kelly of second degree murder.

On appeal the Court held that when a pretrial ruling regarding the admissibility of evidence is made on the merits, the ruling is final and the party losing the motion need not renew his objection at trial in order to preserve the issue for review, unless the judge specifically indicates that a further objection is necessary.

Fabish does not contend, nor has he presented any evidence that suggests, that the trial court issued any instructions requiring further objection, therefore a standing objection existed.

3. The use of preemptive testimony is a trial tactic long endorsed in Washington.

In **State v. Thang** 145 Wn.2d 630, 648 P.3d 1159 (2002), the Court held that a litigant against whom evidence of other crimes is ruled admissible may seek to minimize its effect by introducing it himself. If he does so, he is not precluded from appealing the admissibility of it.

In August 1997, Thang and Simeon Terry, residents of the Maple Lane juvenile facility, escaped while on a field trip to a Seattle Seahawks game. They traveled to Spokane, where they stayed with Jess Dietzen and Sean Lambert.

On September 2, 1997, John Klaus found his 85-year-old mother, Mildred, in Spokane lying dead on the floor of her home in a pool of

blood. She had died from blunt impact injuries. The house was in disarray and it appeared that some of her personal possessions were missing. Her purse was later found on the roof of a neighboring building. Shortly afterwards, the police learned that possible escapees were residing at the Dietzen apartment.

Although there were outstanding warrants for the arrest of Thang and Terry, the police went to the Dietzen apartment, without the warrants in hand, and arrested Terry and Thang. Thang was subsequently found guilty of first degree murder and sentenced to life imprisonment without the possibility of parole. On appeal Thang claimed, among other things, that the trial court erred in failing to suppress evidence obtained during the search of an apartment where he was staying and in admitting evidence of other bad acts.

On a defense motion in limine, the judge excluded testimony regarding a February 1996 conviction for robbery and burglary of Mrs. Morgan, an elderly woman, in Aberdeen.

After the defense rested, the judge ruled that because the defense had produced evidence that Terry was the killer, the State could introduce the prior offense for the purpose of showing identity. In anticipation of Morgan's testimony, the defense moved and was allowed to reopen.

The Court of Appeals concluded that Thang could not complain about the introduction of Mrs. Morgan's testimony about the 1996 offense because Thang, in anticipatory rebuttal, introduced the evidence first. The Court of Appeals concluded that the Morgan testimony was merely cumulative. The Washington Supreme Court disagreed.

Consequently, Fabish's argument that Wilson and Peterson waived their right to appeal admission of the videotape because they included it in their Statement of Evidence also fails for at least two reasons. (1) First as stated previously Wilson and Peterson had a standing objection, and (2) they were forced to alter their trial strategy because of the trial court's ruling on admissibility. In the civil case of **Garcia v. Providence Medical Ctr.**, 60 Wn. App. 635, 641, 806 P.2d 766, review denied 117 Wn.2d 1015 (1991), the plaintiff in a medical malpractice action arising from the death of her newborn child sought unsuccessfully to exclude evidence of her prior abortions and thereafter preemptively testified about the abortions. The Court of Appeals held that she had not waived review.

4. The Invited Error Doctrine is not applicable to the facts of this case.

In **Guntle v. Barnett** 73 Wn.App. 825, 832, 871 P.2d 627 (1994), Division Two stated that the invited error doctrine does not preclude the

consideration of an issue on appeal if the trial court did not in fact adopt the proposed erroneous view of the law.

Guntle appealed a judgment distributing partnership property. The Robinson and Rounds Seafood Company was for sale in late 1986. It owned a building at Bay Center, Washington, in which it operated a fish processing business. It also leased and operated a boat launch facility at Chinook, Washington.

Barnett wanted to purchase Robinson and Rounds, but she lacked the necessary funds. Thus, she spoke with Guntle, and they orally agreed to purchase the business as 50-50 partners. On July 31, 1987, the partnership purchased Robinson and Rounds for \$95,000. A written buy-sell agreement was signed by Guntle, Barnett, and Tommy Guntle as purchasers, and by Robinson and Rounds as sellers.

Disagreements developed among the parties, and in July 1988, Guntle unilaterally took over operation of the boat launch facility at Chinook. Barnett continued to operate the fish plant in Bay Center.

Guntle sued Barnett and Tommy Guntle. He asked for an accounting and other equitable relief, including, if necessary, "distribution of [the partnership] assets remaining after payment of the creditors".

Barnett and Tommy Guntle answered that a partnership existed, and that the partners were Guntle, Barnett and Tommy Guntle.

Barnett argued that Guntle invited error when he proposed in final argument that all of the assets and the Kiske debt be distributed to him, and that the remaining debts be distributed to Barnett.

Contrariwise Fabish has offered no argument, or evidence that remotely suggests that the trial court adopted Dickens' position concerning the inadmissibility of evidence of specific conduct to impeach Wilson or Peterson.

Furthermore, Wilson and Peterson's reference to the videotape in their opening statement was based on the fact that they anticipated the videotape would be presented based on the pretrial ruling of admissibility made by the judge. Therefore, the use of the videotape in opening statement does not invite error. The Court in **State v. Welchel** 115 Wn.2d 708, 727-728, 801 P.2d 948 (1990) held a party's reference in its opening statement to evidence which it expects to be presented at trial and which the court erroneously ruled admissible at a pretrial hearing does not constitute invited error.

Fabish also cites **In re Personal Restraint of Tortorelli**, 149 Wn.2d 82, 66 P.3d 606 (2002) for the holding that the invited error

doctrine prohibits reversal of the admission of evidence offered by the party asserting error. However, **Tortorelli** is distinguishable on its facts from the case at hand, since neither Wilson nor Peterson set up an error in the trial court.

Tortorelli was found guilty of theft, trafficking in stolen property, and criminal profiteering arising from his business of salvaging stray logs and submerged trees from Lake Washington. At trial the State initially offered excerpts from a statute, and Tortorelli insisted on the admission of the entire statute. Then he tried to claim on appeal the statute shouldn't have been admitted. The court held the invited error doctrine prohibited a party from setting up an error in the trial court then complaining of it on appeal.

Fabish, likewise, cites **Shanlian v. Faulk**, 68 Wn.App. 320, 329, 843 P.2d 535, as additional case law which he asserts supports his contention that the invited error doctrine applies. However, as in the case of **Tortorelli, Id., Shanlian** is discernibly distinguishable on its facts.

On appeal Shanlian contended the trial court erroneously considered facts outside the administrative record. The Court agreed. However, the Court held that since Shanlian presented the improper evidence to the trial court, which elicited a response from the Department

of Licensing, for his own purposes, the invited error doctrine prevented him from seeking appellate relief from the effects of his introduction of improper evidence.

5. Fabish incorrectly asserts that Dickens modified his objections to Blackburn's questioning of Wilson and Peterson

Pearce v. Greek Boys' Mining Co., 48 Wash. 38, 92 P. 773

(1907) is referred to by Fabish as authority for his assertion that Dickens waived his objection to Blackburn's questioning of Wilson and Peterson by modifying his objection. However, **Pearce** is distinguishable on its facts, since it can not be reasonably argued that Dickens' misled the court or opposing counsel as to the basis of his objection to Blackburn's questions.

Pearce brought an action against Greek Boys' Mining Co. to recover the sum of \$ 3,500, claimed to be due for services rendered the mining company in managing the operation of the Greek Boys' mines located at Berner's Bay in the territory of Alaska.

Pearce offered in evidence a certified copy of a financial statement filed by Greek Boys' in the United States District Court of Alaska. This statement was objected to in the court below, because it was neither properly certified, nor filed in the office in which the laws of Alaska

required it to be filed. On appeal it was further objected that it was not shown that there was any law of Alaska which required or permitted the filing of such a paper.

When the objection was made in the court below, Pearce's counsel stated that if it was insisted upon he would prove the laws of Alaska relating to the filing of such instruments, stating in the same connection what the statute required in that behalf. The court, also, evidently deeming the statement assented to, restated to the jury the substance of the Alaska statute. Counsel thereupon modified his objection, insisting that a copy was inadmissible for the purposes it was sought to be introduced, namely, as an admission, urging that only the original could be introduced for that purpose. The objection was thereupon overruled and the copy admitted. The court ruled that the procedure used by Pearce indicated a waiver of his first objection.

The court stated the record showed that both the trial judge and the opposing counsel thought it waived. The court held that if a party misleads the court he must abide the result. There has been no argument made by Fabish, nor could there reasonably be one made, that Dickens misled the trial court or opposing counsel about his objection to the introduction of

testimony concerning specific instances of conduct, not related to the bar fight at the Friendly Duck.

On page 27 of his brief Fabish similarly specified **State v. Severns**, 19 Wn.2d 18, 20, 141 P.2d 142 (1943) as support for his argument that Dickens failed to state the basis of his objection to Blackburn's questioning of Wilson and Peterson about instances of specific conduct. This contention is clearly rebutted by the record before the court, since ER 608 was repeatedly cited as at least one basis for his objections. (RP 239, 243, 363, 366, 370-371).

C. Conclusion

Kim's actions in destroying evidence of the commission of a felony contravene a strong public policy embodied in the criminal law for the protection of the public as a whole. The admission of evidence of the videotape allows the Friendly Duck Restaurant to violate public policy as set forth in RCW 9A.72.150. The court should exercise its discretion to hear this issue on appeal. The police officer's opinion, advanced by Fabish that Kim did not appear to be trying to hide anything is irrelevant. The touchstone is simply whether Kim's altering, erasing, or destruction of evidence falls within the statute. A reasonable person could conclude that

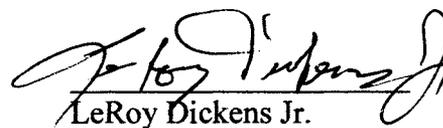
the outcome of the trial might not have been the same, but for the admission of the videotape.

The trial court's decision to deny Wilson's pretrial motion to compel eliminated a unique category of evidence in the exclusive possession and control of the Friendly Duck Restaurant, where there is no feasible alternative for Wilson or Peterson to produce the evidence.

Furthermore, the improper admission of evidence designed for the sole purpose of characterizing Wilson and Peterson as bad people should not be permitted. But for the errors in the lower court the outcome of the trial would have been different.

January 24, 2008

Respectfully submitted,

A handwritten signature in black ink, appearing to read "LeRoy Dickens Jr.", written in a cursive style.

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