

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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DEPUTY

No. 37549-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jamara Humphrey,

Appellant.

Grays Harbor County Superior Court Cause No. 07-1-00535-1

The Hon. Judge David Edwards

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ARGUMENT 5

I. The trial judge violated Ms. Humphrey’s constitutional rights under the Sixth and Fourteenth Amendments by excluding relevant and admissible evidence. 5

II. The admission of irrelevant and prejudicial evidence denied Ms. Humphrey her Fourteenth Amendment right to a fair trial. 8

A. The trial court admitted 404(b) evidence without proper balancing on the record. 8

B. The trial court should not have allowed LaCombe to give his opinion identifying Ms. Humphrey as the person depicted in photographs and videos. 10

C. The trial judge’s erroneous evidentiary rulings prejudiced Ms. Humphrey. 11

III. The prosecuting attorney committed misconduct requiring reversal..... 11

A. The prosecuting attorney unconstitutionally shifted the burden of proof..... 11

B. The prosecutor committed misconduct by arguing that the prosecution “wears the white hat” and “seek[s] justice.” 12

IV. The trial judge should have granted a new trial on Counts II and III after Ms. Humphrey demonstrated that she was in jail for driving with a suspended license on April 6, 2007. 12

CONCLUSION 13

TABLE OF AUTHORITIES

FEDERAL CASES

Douglas v. Alabama, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934
(1965)..... 7

WASHINGTON CASES

City of Bellevue v. Lorang, 140 Wn.2d 19, 992 P.2d 496 (2000)..... 6

State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008)..... 6

State v. Cook, 131 Wn. App. 845, 129 P.3d 834 (2006)..... 11

State v. Hardy, 76 Wn. App. 188, 884 P.2d 8 (1994)..... 10

State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983) 7

State v. Jackson, 102 Wn.2d 689, 689 P.2d 76 (1984) 8

State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008)..... 11

State v. Rehak, 67 Wn.App. 157, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, *cert. denied*, 508 U.S. 953 (1993) 5, 7

State v. Smith, 106 Wn.2d 772, 725 P.2d 951 (1986)..... 8

State v. Wilson, 144 Wn. App. 166, 181 P.3d 887 (2008) 12

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI..... 5, 7

U.S. Const. Amend. XIV 5, 7, 8

Wash. Const. Article I, Section 22..... 5

OTHER AUTHORITIES

ER 404 5, 6, 8, 12

ARGUMENT

I. THE TRIAL JUDGE VIOLATED MS. HUMPHREY'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS BY EXCLUDING RELEVANT AND ADMISSIBLE EVIDENCE.

Respondent concedes that Ms. Humphrey was entitled to submit evidence suggesting that her cousin Keisha perpetrated the charged crimes. Brief of Respondent, p. 8. Given this concession, the trial court should not have excluded any relevant admissible evidence bearing on the issue. U.S. Const. Amend. VI and XIV; Wash. Const. Article I, Section 22; *State v. Rehak*, 67 Wn.App. 157, 162, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, *cert. denied*, 508 U.S. 953 (1993).

Respondent does not support the trial judge's ruling that the excluded evidence was irrelevant. *See* RP (3/12/08) 19-25. Nor does Respondent support the trial judge's decision that the excluded evidence was overly prejudicial. *See* RP (3/12/08) 109, 110-111. Instead, Respondent suggests (1) that Ms. Humphrey could not authenticate the proffered documents, (2) that the evidence was improper character evidence (presumably under ER 404(b)), and (3) that any error was harmless because Ms. Humphrey was allowed to present some evidence relating to Keisha. Brief of Respondent, p. 9.

Respondent is incorrect. First, Ms. Humphrey was not permitted to lay a foundation for the proffered evidence, because the trial judge excluded the evidence as irrelevant and prejudicial to the state. *See* RP (3/12/08) 19-25, 109, 110-111. Ms. Humphrey would have authenticated the documents had she been allowed the opportunity to do so. RP (3/12/08) 107-109.

Second, the evidence was not offered as proof of character, but rather for the “other purposes” referred to in ER 404(b). If permitted to do so, defense counsel would have argued that the evidence was admissible to prove Keisha’s identity and her participation in a common scheme or plan to shoplift from Wal-Mart. *See, e.g.*, RP (3/12/08) 16-24.

Third, the error was not harmless. Constitutional error is presumed prejudicial. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Lorang*, at 32. A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

By preventing Ms. Humphrey from presenting relevant and admissible evidence, the trial court violated her right to due process and her right to compulsory process under the Sixth and Fourteenth Amendments. *Douglas v. Alabama*, 380 U.S. 415, 419, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). Had Ms. Humphrey been permitted to prove Keisha's identity and her involvement in a common scheme or plan to steal from Wal-Mart, a reasonable juror might have found a reasonable doubt in considering Ms. Humphrey's guilt.

The state has not even attempted to apply the proper test for harmless error. *See* Brief of Respondent, pp. 7-10. Accordingly, Ms. Humphrey's conviction must be reversed and the case remanded for a new trial with instructions to permit her to introduce relevant and admissible evidence supporting her defense. *Rehak, supra*.

II. THE ADMISSION OF IRRELEVANT AND PREJUDICIAL EVIDENCE DENIED MS. HUMPHREY HER FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

- A. The trial court admitted 404(b) evidence without proper balancing on the record.

The trial court admitted three allegations¹ of uncharged misconduct (including irrelevant details related to the allegations) without balancing the evidence on the record, in violation of *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). The trial court's failure prevented "‘thoughtful consideration of the issue,’ and frustrates effective appellate review.” *Smith*, 776 (quoting *State v. Jackson*, 102 Wn.2d 689, 694, 689 P.2d 76 (1984)).

Respondent addresses only one of the three allegations raised by Ms. Humphrey—the 2006 arrest at the Everett Wal-Mart—and fails to provide adequate justification for admitting evidence that Ms. Humphrey was arrested, handcuffed, and held in a police car. Brief of Respondent, pp. 11-14. First, Cohen could have testified that he contacted Ms. Humphrey, read the trespass notice to her, and gave her a copy without

¹ The three pieces of 404(b) evidence addressed in Appellant's Opening Brief include Ms. Humphrey's allegedly suspicious presence at the Lacey Wal-Mart in 2004 or 2005, her arrest at the Everett Wal-Mart in 2006, and testimony suggesting that she'd been at the Lacey Wal-Mart on July 12, 2007. RP (3/11/08) 109-110, 42, 61-62, 79-91.

indicating that she was handcuffed and in police custody. He need not even have testified that she had been “detained by Wal-Mart personnel.” Brief of Respondent, p. 12. Second, although the codefendant’s attorney attempted to question Cohen about the signature line on the trespass notice, Ms. Humphrey objected and the objection was sustained. RP (3/11/08) 56. Accordingly, there was no reason for the prosecution to introduce evidence that Ms. Humphrey was in handcuffs when presented with the trespass notice.

The testimony that she was handcuffed and in police custody was highly prejudicial. First, it suggested that Wal-Mart was very certain that Ms. Humphrey was guilty of improper behavior. The store would have been unlikely to detain her and call the police if it had only weak suspicions about her. Second, the evidence implied that the police agreed that there was sufficient evidence to arrest Ms. Humphrey. Evidence that the charges were later dismissed did little to dispel the prejudice, since dismissal does not equate with complete exoneration.

Respondent fails to address the erroneous admission of two other allegations of uncharged misconduct admitted by the trial judge. Brief of Respondent, pp. 11-14. Accordingly, Ms. Humphrey rests on the argument made in her Opening Brief.

B. The trial court should not have allowed LaCombe to give his opinion identifying Ms. Humphrey as the person depicted in photographs and videos.

A lay witness can identify a person depicted in a photograph, but only if the witness is more likely to correctly identify the person depicted than is the jury. *State v. Hardy*, 76 Wn. App. 188, 190, 884 P.2d 8 (1994). In this case, there was no reason to suppose that LaCombe could more accurately identify the person in the photos and videos than the jury could. In fact, LaCombe's testimony turned out to be demonstrably false with regard to the April 6 photographs.² RP (3/11/08) 113-115, 126-130, 136-139; RP (3/12/08) 12, 16, 40-42. The images spoke for themselves, and the jury was competent to decide whether or not Ms. Humphrey was the person depicted.

Respondent does not address the erroneous admission of the captions. Accordingly, Ms. Humphrey rests on the arguments made in her opening brief. Her convictions must be reversed and the case remanded for a new trial, with instructions to exclude the evidence on remand.

² Ms. Humphrey was in jail for driving with a suspended license on April 6. RP (5/23/08) 2.

C. The trial judge's erroneous evidentiary rulings prejudiced Ms. Humphrey.

1. The trial court's cautionary instruction was inadequate to cure the prejudice caused by admission of irrelevant and prejudicial evidence.

Respondent has not addressed deficiencies in the court's cautionary instructions. Accordingly, Ms. Humphrey rests on her Opening Brief.

2. The trial court's errors were not harmless.

Respondent does not address the "reasonable probability" standard for determining prejudice. *State v. Cook*, 131 Wn. App. 845, 854, 129 P.3d 834 (2006). Accordingly, Ms. Humphrey rests on her Opening Brief.

III. THE PROSECUTING ATTORNEY COMMITTED MISCONDUCT REQUIRING REVERSAL.

A. The prosecuting attorney unconstitutionally shifted the burden of proof.

Although it mentions *State v. Montgomery* in passing, Respondent fails to address the Supreme Court's standards for evaluating a prosecutor's "missing witness" argument. Brief of Respondent, p. 15-19, citing *State v. Montgomery*, 163 Wn.2d 577, 183 P.3d 267 (2008).

- B. The prosecutor committed misconduct by arguing that the prosecution “wears the white hat” and “seek[s] justice.”

Ms. Humphrey rests on the argument set forth in her Opening Brief.

IV. THE TRIAL JUDGE SHOULD HAVE GRANTED A NEW TRIAL ON COUNTS II AND III AFTER MS. HUMPHREY DEMONSTRATED THAT SHE WAS IN JAIL FOR DRIVING WITH A SUSPENDED LICENSE ON APRIL 6, 2007.

Ms. Humphrey was prejudiced by the admission of false evidence that she had shoplifted at Wal-Mart on April 6. First, although the jury was instructed that its verdict on one count should not control its verdict on another count, it was not instructed to segregate the evidence. Brief of Respondent, p. 21. Thus, like improperly admitted 404(b) evidence, the false evidence relating to the April 6 allegation prejudiced Ms. Humphrey. Second, contrary to Respondent’s assertion, LaCombe claimed he did personally view the shoplifters on April 6 (in addition to seeing them on the surveillance videos). RP (3/11/08) 111-115; Brief of Respondent, p. 21. His April 6 misidentification was based (in part) on personal observation, just like his July 12th identification.

There is a reasonable probability that the false evidence relating to the April 6th incident influenced the outcome of the case. *State v. Wilson*, 144 Wn. App. 166, 178, 181 P.3d 887 (2008). Accordingly, Counts II and III must be reversed and remanded for a new trial.

CONCLUSION

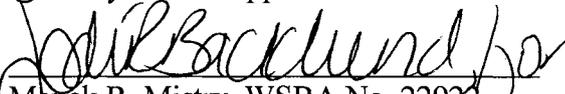
Ms. Humphrey's convictions must be reversed and the case remanded for a new trial.

Respectfully submitted on January 12, 2009.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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and to:

Grays Harbor Prosecuting Attorney
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on January 12, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE
AND CORRECT.

Signed at Olympia, Washington on January 12, 2009.



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