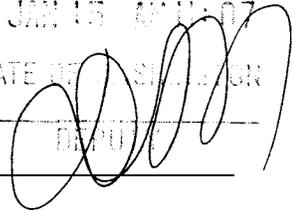


COURT OF APPEALS  
DIVISION II

No. 38012-9-II

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COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON  
BY 

STATE OF WASHINGTON,

Respondent

vs.

JEROME C. PENDER,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR  
THURSTON COUNTY

The Honorable Christine A. Pomeroy, Judge  
Cause No. 07-1-00886-5

PATRICIA A. PETHICK, WSBA NO. 21324  
Attorney for Appellant

P.O. Box 7269  
Tacoma, WA 98417  
(253) 475-6369

P.M. 1-14-2009

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in not allowing Pender to present admissible evidence in his defense.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in not allowing Pender to present admissible evidence in his defense? [Assignment of Error No. 1].

C. STATEMENT OF THE CASE

1. Procedure

Jerome C. Pender (Pender) was charged by information filed in Thurston County Superior Court with one count of attempted murder in the first degree. [CP 5]. The information also included a firearm sentence enhancement allegation. [CP 5].

Prior to trial, Pender made a motion to suppress pursuant to CrR 3.6 arguing that the affidavit in support of the search warrant did not establish probable cause for issuing the search warrant. [2007 RP 7-31]. The court denied Pender's motion to suppress finding the search warrant was supported by probable cause, finding that the gun holster recovered during the search was admissible, but suppressing documents recovered during the search as they were not covered by the search warrant. [2007 RP 7-31]. The court entered the required written findings and conclusions reflecting its ruling. [CP 77-79]. Pender was tried by a jury, the

Honorable Christine A. Pomeroy presiding. The jury was unable to reach a verdict and a mistrial was declared. [2007 RP 352-364].

Pender was then retried by a jury, the Honorable Christine A. Pomeroy presiding. The State was allowed to present the testimony of Norman Field, who was unavailable, from the transcript of Pender's prior trial. [Supp. CP Exhibit No. 63]. The court did not allow Pender to present the testimony of Brandon Franklin, who had testified in the prior trial. [Vol. 1 RP 86-88; Vol. 2 RP 204-208]. The court did allow Pender to present the expert testimony of Dr. Geoffrey Loftus on misidentification during photo montage procedures. [Vol. 2 RP 200-202]. Pender had no objections and took no exceptions to the instructions. [Vol. 2 RP 254-255]. The jury found Pender guilty as charged of attempted murder in the first degree and entered a special verdict finding that Pender was armed with a firearm during the commission of the crime. [CP 108, 109; Vol. 2 RP 309-313].

The court sentenced Pender to a low end standard range sentence of 180-months based on an offender score of zero plus 60-months for the firearm sentence enhancement for a total sentence of 240-months. [CP 110-120; Vol. 2 RP 319-321].

Notice of appeal was timely filed on July 17, 2008. [CP 121].  
This appeal follows.

2. Facts

On May 14, 2007 before 7PM, Marcus Reed (Reed) was heading to his work release appointment in Olympia. [Vol. 1 RP ]. As he was walking around a building, Reed heard a couple of shots being fired, and looked around seeing a man standing holding something in front of him. [Vol. 1 RP 17-18]. Reed then realized he had been shot and started running. [Vol. 1 RP 21-23]. Reed ran into work release and was taken to the hospital. [Vol. 1 RP 23-24]. Reed was shot in the arm and the side/back. [Vol. 1 RP 24-25, 180-181]. A bullet recovered from the shooting was determined to be fired by a gun that shoots .38 caliber ammunition of which .357 Magnum revolver is one. [Vol. 1 RP 116-123, 160-161].

Reed testified that he had a former girlfriend named Ashley Babbs. [Vol. 1 RP 25-26]. After he broke off the relationship with Babbs, she came to Reed's brother's apartment in December of 2005, broke into the apartment, assaulted Reed (pepper sprayed him), and scratched her initials into Reed's car. [Vol. 1 RP 26-27]. Babbs was arrested, prosecuted, and convicted for this incident in 2006. [Vol. 1 RP 27-29; Vol. 2 RP 210-212, 214-216, 218]. Reed testified that he had received some threatening phone calls from Babbs in which she said, "if I would go to court on her, she would have some niggers fuck me up." [Vol. 1 RP 27-29].

Dr. Tate Viehweg was heading home from work a little before 7 PM on May 14, 2007, traveling along Lakeridge Drive when he heard what sounded like gunshots. [Vol. 1 RP 58-59]. He saw two people running—one ran into a building and the other ran towards a parking lot, got in a car, and drove off. [Vol. 1 RP 60-67]. Dr. Viehweg followed the car, which he described as a gray four door sedan, and got its license plate number (924LYH) writing it onto the scrubs he was wearing. [Vol. 1 RP 60-72]. Dr. Viehweg eventually lost the car he was following but went back to where he first heard the shots and spoke with officer about what he had seen. [Vol. 1 RP 60-72]. Dr. Viehweg described the man driving the car as an African-American male in his early 20s about 6 feet to 6 feet 2 inches tall weighing between 175-185 pounds. [Vol. 1 RP 67-69].

Lauri Nolan, who lived across the street from where Reed had been shot, testified that she had been on the phone with a friend when she heard gunshots and saw someone running away. [Vol. 1 RP 145-147, 154-155]. She was shown two photo montages and identified Pender as the person she saw running away in the second photo montage. [Vol. 1 RP 148-149, 155-158, 161-163, 167-168].

Thurston County Sheriff Steve Hamilton (Hamilton) was called onto the case at about 8PM when he received a report that Pierce County authorities had stopped a gray Mercury Grand Marquis license plate

number 924LYH. [Vol. 1 RP 45-48]. Hamilton went to the scene and spoke with the Pender, who was driving the car and matched the description given by Dr. Viehweg. [Vol. 1 RP 45-48]. Pender told Hamilton that he hadn't been to Olympia that day; he had been at work and then at his mother's house in fact the car had been in his possession the whole day. [Vol. 1 RP 45-48]. Pender allowed Hamilton to search the car and finding nothing related to the shooting in Olympia Hamilton released Pender. [Vol. 1 RP 45-48]. The police eventually learned that the gray Mercury Grand Marquis license plate number 924LYH was registered to Ashley Babbs. [Vol. 2 RP 212, 214-216].

Pender's parents testified that Pender's girlfriend was Ashley Babbs and that he sometimes stayed at her home and sometimes drove her car. [Vol. 1 RP 92-95, 97-99]. Pender's father testified that Pender had a concealed weapons permit for a .357 Magnum revolver and that he had shared this information with the police. [Vol. 1 RP 92-95, 166-165]. A search warrant was obtained for Ashley Babbs's residence and a .357 gun holster was found. [Vol. 1 RP 166-167, 176-178].

Norman Field, Pender's cellmate after Pender's arrest, testified that Pender admitting to shooting Reed for his girlfriend. [Supp. CP Exhibit No. 63; 2007 RP 155-156].

Brianna Jones, the supervisor of the Tacoma Boys and Girls Club, testified that Pender had picked up a child on May 14, 2007 at 5:45 PM according to the sign out sheet for that day. [Vol. 1 RP 139-143]. Thurston County Sheriff David Haller testified that the drive from the Boys and Girls Club to the child's home took 5 minutes and that a drive from the child's home to the scene of the shooting took an additional 35 minutes depending on traffic. [Vol. 1 RP 175-176]. Alisha Butler and Jodi Lorenz both testified to hearing the shooting, witnessing the shooter running away, and both described the person as being a white male. [Vol. 2 RP 239-243, 247-250]. Dr. Geoffrey Loftus testified to the potential for misidentification during photo montage procedures. [Vol. 2 RP 218-228, 236-239].

Pender did not testify in his own defense.

D. ARGUMENT

(1) THE TRIAL COURT ERRED IN NOT ALLOWING PENDER TO PRESENT ADMISSIBLE EVIDENCE IN HIS DEFENSE.

a. Overview of the Case.

In the instant case, the State was allowed to present evidence in support of its charge of attempted murder in the first degree against Pender including the following facts: that Reed was shot on his way to work release before 7 PM; that Reed had been involved in a relationship with

Ashley Babbs; that when Reed ended the relationship with Babbs she assaulted and threatened him and damaged his car for which she was prosecuted and convicted; that Babbs was Pender's girlfriend and she allowed him to drive her car (a gray Mercury Grand Marquis license plate number 924LYH); that Pender had a concealed weapons permit and according to his father had a .357 Magnum revolver; that the shot fired at Reed could have come from a .357 revolver; that a search warrant executed on Babbs's home where Pender was known to stay according to his parents revealed a .357 holster; that Dr. Viehweg heard the shooting and saw someone matching Pender's description leaving the scene in a gray sedan license plate number 924LYH; that Lauri Nolan heard the shooting and identified Pender as the person she saw fleeing the scene in a photo montage; that Pender was stopped later on the night in question in Tacoma driving a gray Mercury Grand Marquis with a license plate number 924LYH; and that Pender had told Norman Field, his cellmate after his arrest, that he had shot Reed for his girlfriend. The gun used in shooting Reed was never found.

Pender did not testify in his defense, which was a general denial—he was not the person who shot Reed and could not have been the person as didn't have time to get from Tacoma to Olympia to do the shooting—and presented the following evidence in support of that defense: that

Brianna Jones, the supervisor of the Tacoma Boys and Girls Club, testified that Pender picked up a child in Tacoma at 5:45 PM according to the sign out sheet; that Alisha Butler and Jodi Lorenz both heard the shooting and described the shooter they saw fleeing as being a white male; Dr. Geoffrey Loftus's expert testimony regarding possible misidentification during photo montage procedures calling into question Lauri Nolan's identification of Pender; and Thurston County Detective Haller's testimony in the State's case that it would take a person 5 minutes to take the child Pender had picked up from the Tacoma Boys and Girls to the child's home and an additional 35 minutes depending on traffic to get to Olympia.

What the court precluded Pender from presenting in this his second trial was the testimony of Brandon Franklin, a person attending a work release program on the day in question, who testified in Pender's first trial that the shooting had actually occurred at 6PM while he was attending a work release program, which would have made it impossible for Pender to be in Olympia shooting Reed as he had been picking up a child at the Boys and Girls Club in Tacoma at 5:45PM. [2007 RP 144-148; Vol. 1 RP 86-88; Vol. 2 RP 204-208]. Franklin's testimony was solely as that of a fact witness albeit one that contradicted the State's position as to this case, but one to which Pender was fully entitled to present as part of his

defense. The court, totally misunderstanding Pender's defense, denied Pender's request to present this testimony, relying on State v. Hancock, 109 Wn.2d 760, 748 P.2d 611 (1988), holding that Pender could not "set up a dichotomy in your own case" that Pender was at the Boys and Girls Club at approximately 5:45 PM and that that witness [Jones] was mistaken via Franklin's testimony (given Franklin's estimated time of the shooting in Olympia)—a person may not call a witness for the primary purpose of eliciting inadmissible impeachment testimony. [Vol. 1 RP 86-88; Vol. 2 RP 204-208]. In doing so, the trial court committed reversible error in that it precluded Pender from presenting a viable defense.

b. The Law and Argument.

Under the Sixth Amendment to the Federal Constitution and Art. 1 sec. 22 (amend. 10) of the Washington Constitution, a criminal defendant has the right to present all admissible evidence in his or her defense. State v. Clark, 78 Wn. App. 471, 999 P.2d 964 (1995); State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996). Evidence is admissible when relevant, provided other rules do not preclude its admission. State v. Clark, 78 Wn. App. at 477; ER 401, 402, *see also* State v. Austin, 59 Wn. App. 186, 194-95, 796 P.2d 746 (1990).

What Pender sought to present via Franklin's testimony was that the shooting might actually have occurred at 6PM and was not a

“dichotomy” rather simple corroboration of his defense that he could not have been the shooter as it was documented that he was picking up a child at the Boys and Girls Club in Tacoma at 5:45 PM and as testified to by Detective Haller at least 35 minutes away from Olympia. The court’s denial of this testimony evidences a fundamental misunderstanding of the rules of evidence and the law.

State v. Hancock, supra, relied upon by the trial court in denying Pender the right to present Franklin’s testimony, turns on the issue of impeachment of a witness by evidence of their prior inconsistent statements. Pender was not attempting to do so in the instant case by seeking to present Franklin’s testimony. He was merely trying to establish his defense to which he was constitutionally entitled to do by presenting evidence corroborating Jones’s testimony. While the State (and the court for that matter) may have disliked the fact that Pender was presenting a defense that called into question the credibility of the evidence presented in the State’s case in chief the court’s function is not to prohibit the presentation of admissible, if contradictory, evidence to the jury but to allow the jury to consider all the evidence as the jury is the ultimate arbiter of the outcome of any case based on a weighing of all the facts. It is not for a judge to preclude a defendant from fully presenting his defense when

there is no evidentiary or caselaw reason from doing so other than those facts do not conform to the State's version of the events.

E. CONCLUSION

Based on the above, Pender respectfully requests this court to reverse and dismiss his conviction for attempted murder in the first degree as he was denied his constitutional right to fully present his defense.

DATED this 14<sup>th</sup> day of January 2009.

*Patricia A. Pethick*  
PATRICIA A. PETHICK  
Attorney for Appellant  
WSBA NO. 21324

CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 14<sup>th</sup> day of January 2009, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Jerome C. Pender  
DOC# 320567  
Clallam Bay Corrections Center  
1830 Eagle Crest Way  
Clallam Bay, WA 98326

Carol La Verne  
Thurston County Dep. Pros. Atty.  
2000 Lakeridge Drive SW  
Olympia, WA 98502  
(and the transcript)

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION I  
09 JAN 16 AM 11:07  
BY [Signature]

Signed at Tacoma, Washington this 14<sup>th</sup> day of January 2009.

Patricia A. Pethick  
Patricia A. Pethick