

NO. 38539-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHNNY CASSANOVA TWITTY,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable James Orlando Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court committed reversible error when it engaged in ex-parte contact with a witness regarding appellant's case.
2. Mr. Twitty was denied his right to a fair trial when the trial court suppressed evidence necessary to support Mr. Twitty's self-defense case.

Issues Pertaining to Assignments of Error

1. Did the trial court commit reversible error when it engaged in ex-parte contact with a witness regarding appellant's case?
2. Was Mr. Twitty denied his right to a fair trial when the trial court suppressed evidence necessary to support Mr. Twitty's self-defense case?

B. STATEMENT OF THE CASE

1. Procedural Facts

Johnny Cassanova was charged by amended information and found guilty of unlawful possession of a firearm in violation of RCW 9A.41.010; assault in the first degree in violation of RCW 9A.36.011; and attempted first degree murder in violation of RCW 9A.32.030. CP 115-121, 122-23. Mr. Twitty was tried by a jury the Honorable

James Orlando presiding. RP43-35. This timely appeal follows. CP 161.

2. Substantive Facts

a. Motion in Limine

During pretrial motions, the state, over defense objection successfully obtained suppression of evidence that the gun used in the shooting belonged to Adrian Serrano, a friend of the victim Larry Mahone. RP 165-167. The defense argued that the gun was inside Mr. Serrano's backpack with Mr. Serrano's identification in the trunk of Mr. Mahone's car and since Mr. Serrano was with Mr. Mahone the gun could have been Mr. Mahone's. RP 167. Mr. Twitty's theory of the case was that Mr. Mahone and Mr. Serrano were known gang members who brought the gun to the bar anticipating a gang related conflict.. RP 167.

The trial court ruled that the gun had only "limited relevance" because Mr. Mahone did not admit to having a gun until after the struggle began and Mr. Mahone raised a self-defense claim. RP 167-68. Ultimately the trial court ruled the gun was not relevant because there was no testimony about a second gun. RP 168

The state successfully suppressed evidence that Mr. Mahone was: (1) a gang member who had a belt buckle with a gang symbol

on it for "Lakewood Hustlers"; (2) that he had a picture with himself throwing gang symbols; (3) that Mr. Mahone's gang moniker was "C-money"; (4) that Mr. Mahone was involved in a conflict with the Hilltop Crips. . RP 169-72.

The court ruled:

THE COURT: Well, I guess the only relevance I see is the alleged comments by Mr. Mahone to the defendant early on, "Do you have any weapons? Do you have any guns? We expect some problems with the Crips later," et cetera, et cetera. The defendant testified in the 3.5 hearing he thought that was being used to intimidate him or scare him in some fashion. I am not quite sure of the link to then how it is that Mr. Mahone pulls the gun and shoots himself, but irrespective of that, he's testified to some initial comment arguably in a self-defense case where here's going to be a claim that he was fearful of the defendant. I think there may be some relevance, but you certainly would need to have a hearing outside of the presence of the jury with Mr. Mahone to get into those issues. I don't think it would be fair to subject him to that in the presence of the jury.

RP 174. The Court further ruled, "[t]he only relevance in my mind comes to the limited conversation that the defendant may have had with Mr. Mahone concerning gang activities." RP 175. The Court excluded all gang related evidence because the court believed that Mr. Mahone's lack of prior knowledge of Mr. Mahone's gang affiliation trumped Mr. Twitty's awareness the night of the incident that Mr. Mahone was a gang member. RP 175-78.

b. Trial Facts

Johnny Twitty admitted to shooting Larry Mahone on October 3, 2007, in self defense. RP 225, 861-863. Mr. Twitty spent the day and evening of October 2, 2007 drinking beer and tequila with his friend Lonzell Graham in Mr. Twitty's home. RP 730-32. By self report of Mr. Twitty and from the testimony of the police, Mr. Twitty was intoxicated and impaired from intoxication. RP 38, 76, 468, 489, 882. Mr. Twitty's testimony was inconsistent regarding the incident, a shooting at O'Gallagher's Bar in Lakewood, Washington. RP 225, 825-50.

Terrence Khun, the night manager of H and L produce a business 150 -200 yards from O'Gallagher's testified to hearing shots in the early morning hours of October 3, 2007. RP 289, 293. Mr. Khun was inside the produce store when he heard the shots. RP 293. After Mr. Khun ran outside he observed from 150 ft, what appeared to be Mr. Twitty shooting at Mr. Mahone as Mr. Mahone initially moved away from Mr. Twitty and then ran toward Mr. Twitty. RP 294, 296. Mr. Khun did not see how the altercation began and did not know how it started or if Mr. Twitty wrestled the gun away from Mr. Mahone. 330. No witness observed how the altercation began.

Mr. Mahone testified that he was at O'Gallagher's and left to get his friend Adrian Serrano. RP 426-27, 429. Mr. Mahone testified that he returned to the bar, went inside and exited to smoke a cigarette next to Mr. Twitty who was outside smoking. RP 430 Mr. Serrano was outside as well. RP 431. According to Mr. Mahone, Mr. Twitty just started shooting at him. RP 431.

Mr. Mahone admitted on cross examination that he was concerned when 3-4 people came in to the bar that "did not look right". RP 444 Mr. Mahone told Mr. Twitty, "Be careful" you know "something's going on or," or Looks like UFO's¹ been coming in and out". RP 445. Mr. Mahone testified that he was just giving Mr. Twitty a "heads-up". Id. Mr. Mahone testified that he could have asked Mr. Twitty if he had a gun because of the UFO's RP 446. Mr. Mahone also admitted that after he was initially shot he could have charged at Mr. Twitty. RP 8. Mr. Mahone denied provoking the gun battle and denied touching the gun. RP 431, 449-50.

Mr. Twitty testified after he arrived at O'Gallagher's Mr. Mahone asked him if he had a gun and Mr. Twitty felt intimidated because Mr. Mahone was talking about "outsiders" and Mr. Twitty, who was not from Tacoma, believed Mr. Mahone was talking about

Mr. Twitty. RP 740-41. Mr. Twitty believed that Mr. Mahone was planning to “jump him”. RP 741.

Mr. Twitty went outside to smoke. While outside, Mr. Mahone drove up in the car with Adrian Serrano. Mr. Mahone said to Mr. Twitty, “Cuz, let me get a cigarette”. RP 746- 748. Mr. Twitty testified that “Cuz” was a gang threat. RP 796-97. Not wanting trouble, Mr. Twitty gave Mr. Mahone a cigarette while Mr. Mahone was still in his car. Mr. Mahone got out of his car and pulled a gun on Mr. Twitty. RP 749. Mr. Twitty jumped off of his stool and started to struggle with Mr. Mahone for the gun while the gun was firing. RP 750. After the gun fell to the ground both Mr. Mahone and Mr. Twitty tried to retrieve it. RP 858. Mr. Twitty was able to reach the gun. RP 858. Mr. Mahone rushed at Mr. Twitty and Mr. Twitty started firing the gun in self-defense to prevent Mr. Mahone from attacking him. RP 861-64.

C. ARGUMENT

1. THE TRIAL COURT’S EX-PARTE CONTACT WITH A WITNESS VIOLATED CANON 3 OF THE CODE OF JUDICIAL CONDUCT REQUIRING REVERSAL OF THE CONVICTIONS AND REMAND FOR A NEW TRIAL

¹ UFO’s are unidentified people.

Canon 3 of the Code of Judicial Conduct (“CJC”), mandates that judges perform the duties of their offices impartially. In relevant part CJC 3 provides:

Judges should accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law, and, except as authorized by law, neither *initiate* nor consider *ex parte* or other communications concerning a pending or impending proceeding. . . .

Scott Sherman M.D. v. State of Washington, 128 Wn.2d 164, 204-05; 905 P.2d 355 (1995), quoting, CJC Canon 3(A)(4) (1994) (emphasis added).

The comments to Canon 3 explain that the prohibition against *ex parte* communications includes contacting neutral third parties about a pending case:

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and *other persons who are not participants in the proceeding*, except to the limited extent permitted. . . .

CJC Canon 3(A)(4) cmt. (1994) (emphasis added). The CJC does not define the term “*ex-parte*”. Our Supreme Court has however done so with the aid of Black’s Law Dictionary in State v. Watson,

155 Wn.2d 574, 579-80, 122 P.3d 903 (2005). The term “ex parte communication” refers to “communications made by or to a judge, during a proceeding, regarding that proceeding, without notice to a party.” Watson, 155 Wn.2d at 579.² The statements made by or to the judge can involve a party or a neutral third party. CJC 3(A)(4) cmt. 5 . In Mr. Twitty’s case, the trial judge contacted witness Dr. Balderamma during the proceeding about an issue related to the case without notifying the parties.

² “State v. Bourgeois, 133 Wn.2d 389, 407-08, 945 P.2d 1120 (1997) (finding an improper ex parte communication between the bailiff (the alter-ego of the judge) and the jury where a juror told the bailiff of juror intimidation which the bailiff relayed to the judge, but which the judge did not pass on to counsel); Sherman v. State, 128 Wn.2d 164, 181, 205, 905 P.2d 355 (1995) (finding an ex parte communication where a judge’s judicial extern contacted the Washington monitored treatment program to find out about the monitoring of physicians in the Sprogram, specifically the plaintiff in a case before the judge involving an employment dispute over the plaintiff’s drug use); Buckley v. Snapper Power Equip. Co., 61 Wn. App. 932, 937-38, 813 P.2d 125 (1991) (holding that a direct communication between a trial judge and a guardian ad litem regarding settlement, which was passed on to defense counsel without the knowledge or participation of the plaintiff’s counsel, was an improper ex parte communication); State v. Romano, 34 Wn. App. 567, 568-69, 662 P.2d 406 (1983) (concluding there was an ex parte communication where a judge, during a current proceeding, contacted third parties to verify the defendant’s income without the defendant’s knowledge); United States v. Forbes, 150 F. Supp. 2d 672, 677 (D.N.J. 2001) (reasoning the “term [ex parte] contemplates that one actually be a party to a matter before the communication of another party is considered ‘ex parte.’”). “Watson, 155 Wn.2d at 579-80.

State v. Sherman, is squarely on point and provides controlling authority on this issue for the instant case. In Sherman, Dr. Sherman filed suit claiming wrongful discrimination law suit under the Americans with Disabilities Act, section 504. In Sherman, the doctor's chemical dependency problems were at issue. The trial judge sent his clerk to contact the physicians involved in monitoring Dr. Sherman's chemical dependency progress. The Supreme Court "conclude[d] that the judge violated the unambiguous dictates of this rule [CJC 3] when he directed his extern to contact the physicians regarding Dr. Sherman's chemical dependency. Sherman, 128 Wn.2d at 205, citing, State v. Romano, 34 Wn. App. 567, 569, 662 P.2d 406 (1983).

In the instant case, following a motion for a continuance from the defense due to Mr. Twitty's incapacity from a recent surgery, (RP 197-98, 200-02, 205) the trial judge directly and without a release from Mr. Twitty, contacted:

Vince Goldsmith over in the jail who's talking to Mr. Balderrama – Doctor Balderrama, who I think in the jail medical director. He is going to get the chart reviewed and give me a call within the hour, hopefully, sooner, as to the status.

I posed a number of questions whether or not there was another

medication that could be given to Mr. Twitty in lieu of Vicodin that potentially would have a lesser effect, whether or not they could change the time that he's given his drugs, et cetera. SO they will call me back here as quickly as possible.

.....

I had a conversation with Doctor Balderrama, who indicated that the procedure that Mr. Twitty had was a minor procedure to drain some fluid that he's on a low dosage of Vicodin, this shouldn't affect his ability to participate in the trial at all.

RP 205-206. Dr. Balderrama, later testified in Mr. Twitty's case regarding Mr. Twitty's ability to stand trial while on Vicodin and other pain medications. RP 208-215.

The Washington State Supreme Court in Sherman, proscribed precisely the ex-parte contact engaged in by the trial judge in Mr. Twitty's case. The judge herein violated the unambiguous dictates of CJC 3 when he called Dr. Balderamma, a witness in Mr. Twitty case, and had a conversation with him. Sherman, 128 Wn.2d at 205, citing, State v. Romano, 34 Wn. App. 567, 569, 662 P.2d 406 (1983).

In Sherman, the Court reversed and remanded for a new trial and held that a judge may not preside over a case where he engages in ex-parte contact regardless of prejudice. Sherman, 128 Wn.2d at 205. The Court articulated that the question is not whether a party was prejudiced but rather whether there was an appearance of a lack of impartiality. The test for determining whether the judge's impartiality might be questioned is an objective test that assumes that "a reasonable person knows and understands all the relevant facts." Sherman, 128 Wn.2d at 206.

[I]n deciding recusal matters, actual prejudice is not the standard. The CJC recognizes that where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating. The CJC provides in relevant part: "Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned" *CJC Canon 3(C)(1)* (1995).

Sherman, 128 Wn.2d at 206.

As in Sherman, remand for a new trial is required because the trial judge's ex-parte conversation with Dr. Balderamma raised the suspicion of partiality.

2. MR. TWITTY WAS DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE TRIAL COURT EXCLUDED RELEVANT EVIDENCE THAT WOULD HAVE STRENGTHENED APPELLANT'S ARGUMENT THAT THE VICTIM WAS A GANG MEMBER WHO INITIATED THE INCIDENT.

Trial court should have admitted evidence regarding Mr. Serrano's gun and all of the gang evidence related to Mr. Mahone to demonstrate that Mr. Mahone, a gang member, was involved in a conflict with another gang and went to O'Gallagher's the night of the shooting with a gun knowing that a gang dispute would erupt. The trial court excluded this evidence which would have supported Mr. Twitty's self-defense case. Ultimately exclusion of this evidence deprived Mr. Twitty of his constitutional right to fair trial. Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996); State v. Roberts, 80 Wn. App. 342, 908 P.2d 892 (1996).

Under the Sixth Amendment U.S. Const. amend. VI. and under article 1, section 22 of our state constitution, a criminal defendant has the right to present testimony in his defense. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). The

Washington State Supreme Court recently reiterated that a defendant has the right to present his version of the facts and that a right to present a defense is a fundamental element of due process of law. State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004). Although a defendant has a right to present his version of the facts, he does not have a right to present irrelevant evidence. Hudlow, 99 Wn.2d at 15.

In State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002), interpreting Hudlow, the State Supreme Court clarified that the reviewing Courts examine the exclusion of relevant evidence a defendant presented under a three-prong approach. Darden, 145 Wn.2d at 622.³ First, the court must determine if the evidence is relevant. Darden, 145 Wn.2d at 622. Second, the court must determine if the State has met its burden of showing the evidence is prejudicial. Darden, 145 Wn.2d at 622. Third, the court balances the defendant's need for the information against the State's interest in excluding prejudicial evidence. Exclusion is proper only if the

³ The Darden court addressed the defendant's right to confrontation rather than presentation of evidence in his case in chief. Darden, 145 W.2d at 624. But Darden relied on Hudlow, which addressed a defendant's right to present evidence as well as the defendant's right to cross-examine witnesses. Hudlow, 99 Wn.2d at 14-15. Therefore, the analysis in Darden applies to a defendant's right to present evidence.

State's interest outweighs the defendant's. Darden, 145 Wn.2d at 622.

In applying this balancing test, the court in Darden relied on rules of evidence, holding that relevant evidence may be excluded if its probative value is substantially “ ‘outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.’ ” Darden, 145 Wn.2d at 625 (quoting ER 403). A defendant's constitutional right to present evidence or cross-examine witnesses apply to the defendant but the rules of evidence may be relaxed where the defendant's constitutional rights are at stake. See Darden, 145 Wn.2d at 619 (noting that a defendant may have more latitude to explore motive, bias, credibility, and foundational matters in cross-examination).

Darden, 145 Wn.2d at 624 (“we apply basic rules of evidence to determine whether the trial court violated [the defendant's] confrontation rights.”), see also Chambers v. Mississippi, 410 U.S. at 302.

Notwithstanding the constitutional rights at issue, appellate Courts review the admission of evidence for abuse of discretion. State v. Rehak, 67 Wn .App. 157, 162, 834 P.2d 651 (1992),

review denied, 120 Wn.2d 1022 (1993); Darden, 145 Wn .2d at 619. The trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Applying the test in Hudlow, the first question is whether the evidence of Mr. Mahone's gang affiliation was relevant. Darden, 145 Wn.2d at 622. The trial Court indicated that gang evidence would only be relevant if Mr. Twitty testified consistent with his 3.5 testimony regarding Mr. Mahone informing Mr. Twitty that there was gang trouble on October 3, 2007. RP 174, 176-77. The judge did not believe the gun was relevant because he only heard Mr. Twitty's testimony and there was no other discussion of Mr. Serrano's gun in the back of Mr. Twitty's car.

The trial court orally ruled:

Well, I guess the only relevance I see is the alleged comments by Mr. Mahone to the defendant early on, "Do you have any weapons" Do you have any guns? We expect some problems with the Crips later", etc cetera, etcetera.

The defendant testified in the 3.5 hearing that he thought that was being used to intimidate him or scare him in some fashion. I am not quite sure of the link then to how it is that Mr. Mahone

pulls a gun and shoots himself, but irrespective of that, he's testified to some initial comment arguably in a self-defense case where there's going to be a claim that he was fearful of the defendant. [sic] I think there may be some relevance, but you certainly would need to have a hearing outside of the presence of the jury with Mr. Mahone to get into those issues. I don't think it would be fair to subject him to that in the presence of the jury.

RP 173-74. The trial court applied the wrong test for determining relevance. ER 401.

"Relevant" evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ER 401. Mr. Mahone's gang involvement and his friend Mr. Serrano's proximity to Mr. Mahone and his possession of a gun the night of the incident are relevant to demonstrate that Mr. Mahone anticipated a gang-related gun battle unrelated to Mr. Twitty.

The second inquiry is whether the State's interest in excluding prejudicial evidence and determine if the defendant's need for that evidence outweighs the State's interest in avoiding prejudice. Darden, 145 Wn.2d at 622. The issue in Mr. Twitty's

case was whether he intended to harm Mr. Mahone or whether he acted in self-defense. The judge's ruling does not address the issue of unfair prejudice. Once the Court determined that Mr. Twitty could present his self-defense, it could not then legitimately prohibit Mr. Twitty from presenting evidence in support of his defense. Mr. Mahone's gang involvement and the gun supported Mr. Twitty's claim that he was the victim of violence and acted in self-defense.

The suppression of evidence denied Mr. Twitty his right to a fair trial. State v. Maupin and State v. Roberts similarly held that suppression of evidence relevant to the defense theory constituted reversible error. In Maupin, supra, Supreme Court finding the evidence relevant reversed the Court of Appeals affirmance of the trial court's suppression of evidence that the victim was seen alive in the presence of a person other than the defendant when the state alleged that the victim was with the defendant. Maupin, 128 Wn.2d at 928- 930.

In Roberts, supra, the Court Of Appeals reversed the trial court finding that trial court denied Roberts the right to present this defense by excluding testimony from three witnesses, and by sustaining a hearsay objection to part of Roberts's testimony related to this defense. Roberts, 80 Wn. App. at 344.

Mr. Twitty's suppression issue is of constitutional magnitude and the error is not harmless. When the trial court errs in an evidentiary ruling, the State must show beyond a reasonable doubt that the jury would have reached the same result in the absence of the error. State v. Maupin, 128 Wn.2d 918, 928-29, 913 P.2d 808 (1996).

In Mr. Twitty's case, had the jury understood the suppressed evidence it is not at all certain that the jury would have reached the same results. State v. Austin, 59 Wn. App. 186, 195, 796 P.2d 746 (1990). In summary, the suppressed evidence included evidence that: (1) Mr. Mahone approached Mr. Twitty with information regarding a gang dispute; (2) that Mr. Mahone wanted to know if Mr. Twitty had a gun because Mr. Mahone anticipated a gun battle with the Crips; (3) that Mr. Mahone was a Lakewood Hustler gang member; and (4) that Mr. Mahone's associate the night of the shooting had a gun.

Because suppression of this evidence denied Mr. Twitty his right to present his case, reversal is the remedy for prejudicial error.

D. CONCLUSION

The trial court's ex-parte communications with a witness violated the appearance of impartiality requiring a new trial. The

trial's court's suppression of gang evidence related to Mr. Twitty's defense denied Mr. Twitty his right to a fair trial also requiring remand for anew trial. MR. Twitty respectfully requests this Court reverse his convictions and remand for a new trial.

DATED this 6th of April 2009

Respectfully submitted,

LAW OFFICES OF LISE ELLNER

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LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor 930 Tacoma Ave S. Rm. 946 Tacoma, WA 98492 and Johnny Twitty DOC# 736255 Washington State Penitentiary 1313 13th Avenue Walla, Walla, WA 99362 a true copy of the document to which this certificate is affixed, On April 6, 2009. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

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