No. 41394-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Rushelle Stoken,

Appellant.

Grays Harbor County Superior Court Cause No. 09-1-00228-5

The Honorable Judge David Edwards

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
Backlundmistry@gmail.com

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ARGUMENT

I. THE TRIAL COURT SHOULD HAVE ALLOWED MS. STOKEN TO CROSS EXAMINE THE INFORMANT REGARDING HIS BIAS.

A. The standard of review is *de novo*.

Constitutional violations are reviewed *de novo*. *State v. Schaler,* 169 Wash.2d 274, 282, 236 P.3d 858 (2010). Although evidentiary rulings are ordinarily reviewed for an abuse of discretion, this discretion is subject to the requirements of the Sixth Amendment. *United States v. Lankford,* 955 F.2d 1545, 1548 (11th Cir. 1992). Where a limitation on cross-examination directly implicates the values protected by the Sixth Amendment's confrontation clause, review is *de novo*. *United States v. Martin*, 618 F.3d 705, 727 (7th Cir. 2010). Respondent's contention that confrontation right violations may be sustained under an abuse-of-discretion standard lacks merit. *See* Brief of Respondent, pp. 8-9.

B. The trial judge specifically prohibited cross-examination into evidence of bias, in violation of Ms. Stoken's confrontation rights.

An accused person has a constitutional right to confront witnesses. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 22. Cross-examination designed to elicit witness bias directly implicates the Sixth Amendment. *Martin, at* 727. Accordingly, an accused person has a constitutional right to impeach adverse witnesses

with bias evidence. *State v. Spencer*, 111 Wash.App. 401, 408, 45 P.3d 209 (2002).

Evidence that shows witness bias is relevant and admissible, even if it would ordinarily be excluded under ER 608(b) as a specific instance of conduct submitted for the purpose of attacking credibility.[1] *United States v. Abel*, 469 U.S. 45, 50-51, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984) (interpreting Federal Rules of Evidence). An accused person must be allowed to cross-examine a witness regarding any expectation that testimony might affect the resolution of a pending charge. *Martin, at* 727-730. A witness may provide biased testimony "given under... [an] expectation of immunity," even if no promise has been made. *Alford v. United States*, 282 U.S. 687, 693, 51 S.Ct. 218, 75 L.Ed. 624 (1931).[2] A witness with such expectations may have "a desire to curry favorable treatment" in connection with the pending charge. *Martin, at* 727.

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[1] ER 608 (b) provides that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence," but may be the subject of cross-examination if relevant to credibility.

[2] *See also Davis v. Alaska*, 415 U.S. 308, 319-320, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974) (juvenile witness's probationary status relevant to bias); *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) (prosecution's dismissal of charges might have "furnished the witness a motive for favoring the prosecution in his testimony"); *United States v. Anderson*, 881 F.2d 1128, 1138 (D.C. Cir. 1989) (possibility that dismissed charges could be reinstated is relevant to bias).

In this case, the court prohibited Ms. Stoken from asking the confidential informant about violations of his agreement. RP 11, 17-20. Ms. Stoken outlined the terms of the agreement[3] and told the court of the informant's violation of those terms (by the commission of new crimes). RP 11, 17-20. Despite this, the court refused to allow the inquiry. RP 19-20. This violated Ms. Stoken's right to confrontation. *Martin, supra.*

The fact that Ms. Stoken was able to impeach the informant with other information does not cure the error:

> That the defendants were permitted to examine other matters relating to [the witness's] alleged bias, such as the written plea agreement and [his] prior convictions, does not resolve the Sixth Amendment violation.

Martin, at 730. Evidence that the informant committed new crimes in violation of his plea agreement constituted "a separate and independent area of bias," which is "distinguished from the other areas of bias." *Id.* Respondent's argument to the contrary—which erroneously relies on the abuse of discretion standard—should be disregarded. Brief of Respondent, pp. 12-13.

The confrontation error is presumptively prejudicial. *State v. Jasper*, 158 Wash.App. 518, 536, 245 P.3d 228 (2010). Respondent has

[3] The agreement included a requirement that the informant abstain from committing additional crimes. RP 11.

not attempted to argue that any error was harmless beyond a reasonable doubt. Brief of Respondent, pp. 12-13. *See City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000); *State v. Burke,* 163 Wash.2d 204, 222, 181 P.3d 1 (2008). For these reasons, the convictions must be reversed and the case remanded for a new trial. *Id.*

C. Ms. Stoken made a complete and sufficient offer of proof; furthermore, the confrontation error may be raised for the first time on appeal as a manifest error affecting a constitutional right.

The facts outlined by defense counsel were sufficient to implicate Ms. Stoken's confrontation right, regardless of whether the informant "was ever in danger of losing the benefit of his contract," or "was ever in jeopardy of losing the benefit of his contract." Brief of Respondent, pp. 10-11. Under the terms of the agreement, the informant's new crimes put him at risk of losing the benefit of his contract, and gave him an even stronger desire to curry favorable treatment than he might otherwise have had. *Id.* Defense counsel provided an adequate basis for the trial court to make a ruling; accordingly, Respondent's criticism of this offer of proof is not well taken. Brief of Respondent, pp. 9-11.

Furthermore, even if the offer of proof were deficient, the error may be reviewed for the first time on appeal as a manifest error affecting

Ms. Stoken's constitutional right to confrontation.[4] RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court "previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." *State v. Walsh,* 143 Wash.2d 1, 8, 17 P.3d 591 (2001). An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wash.2d 428, 433, 197 P.3d 673 (2008).

In this case, the court's infringement of Ms. Stoken's confrontation right had practical and identifiable consequences at trial, because it limited Ms. Stoken's ability to cross-examine the key prosecution witness. The informant provided the only direct evidence of Ms. Stoken's guilt on each charge. In the absence of cross-examination, the jury was denied information necessary to evaluate the informant's bias and credibility. Accordingly, Ms. Stoken is entitled to raise the issue for the first time on review, if her offer of proof to the trial court is deemed insufficient. *Nguyen, at* 433.

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[4] In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); *see State v. Russell,* 171 Wash.2d 118, 122, 249 P.3d 604 (2011) . This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

The trial court's ruling violated Ms. Stoken's confrontation right under the state and federal constitutions. *State v. Foster,* 135 Wash.2d 441, 455-56, 957 P.2d 712 (1998). Her convictions must be reversed and the case remanded for a new trial. *Id.*

II. THE PROSECUTOR'S MISCONDUCT REQUIRES REVERSAL.

The prosecutor committed reversible misconduct by repeatedly noting that the testimony was "uncontradicted." RP 130-132. This argument commented on Ms. Stoken's right to remain silent. *United States v. Tanner*, 628 F.3d 890, 899-900 (9th Cir. 2010). Without citation to the record, Respondent asserts that "[m]ultiple individuals were present when Ms. Stoken committed these crimes." Brief of Respondent, p. 15. Respondent's failure to cite to the record "places an unacceptable burden on opposing counsel and on [the] court." *Lawson v. Boeing Co.* 58 Wash.App. 261, 271, 792 P.2d 545 (1990). Respondent does not identify these individuals. Nor does Respondent attempt to show that they were not only present but also in a position to witness Ms. Stoken's conduct. Brief of Respondent, p. 15.

Because the misconduct infringed Ms. Stoken's constitutional right to remain silent,[5] she need not speculate on the effect of a curative instruction; instead, the error is presumed prejudicial, and Respondent bears the burden of proving harmlessness beyond a reasonable doubt. *State v. Toth*, 152 Wash.App. 610, 615, 217 P.3d 377 (2009). Respondent makes no effort to do so. Brief of Respondent, pp. 13-18. The convictions must be reversed and the case remanded for a new trial. *Id.*

III. THE INFORMATION FAILED TO CHARGE THE "TRUE THREAT" ELEMENT OF INTIMIDATING A WITNESS.

The Supreme Court has stated that an essential element is "one whose specification is necessary to establish the very illegality of the behavior." *State v. Johnson*, 119 Wash.2d 143, 147, 829 P.2d 1078 (1992). (citing *United States v. Cina,* 699 F.2d 853, 859 (7th Cir.), *cert. denied,* 464 U.S. 991, 104 S.Ct. 481, 78 L.Ed.2d 679 (1983)). Put another way, the elements are "[t]he facts that the government must prove for a criminal to receive a sentence..." *U.S. v. Julian*, 633 F.3d 1250, 1253 (11th Cir. 2011).

[5] Respondent disputes that the error may be reviewed for the first time on appeal under RAP 2.5. Brief of Respondent, pp. 14-15. However, this argument hinges on the merits: Respondent asserts that others could have rebutted the evidence. Brief of Respondent, p. 15. Respondent's argument on this point is incorrect, as outlined above, and Respondent fails to assert any other basis to deny review of this constitutional error.

In order for a person to receive a sentence for Intimidating a Witness, the government must prove, *inter alia,* that the person made a "true threat." *See, e.g,. State v. King*, 135 Wash.App. 662, 145 P.3d 1224 (2006); *State v. Johnston*, 156 Wash.2d 355, 360-361, 127 P.3d 707 (2006).[6] A "true threat" is therefore a nonstatutory element of the offense; absent proof of a "true threat," a person may not receive a sentence for Intimidating a Witness. *Johnson, at* 147; *Julian, at* 1253; *but see State v. Tellez*, 141 Wash.App. 479, 483-484, 170 P.3d 75 (2007) *and State v. Atkins,* 156 Wash.App. 799, 805, 236 P.3d 897 (2010).

The Information in this case did not allege that Ms. Stoken made a "true threat." Accordingly, the intimidating charge must be dismissed without prejudice. *State v. McCarty*, 140 Wash.2d 420, 425, 998 P.2d 296 (2000)

IV. MS. STOKEN WAS DEPRIVED OF HER SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Appellant rests on the argument set forth in her Opening Brief.

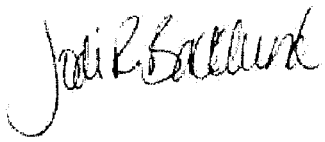
[6] Respondent erroneously contends that *Johnston* addressed the argument made in this case. Brief of Respondent, p. 21. This is incorrect. The *Johnston* Court reversed a conviction based on deficiencies in the jury instructions; it did not address the sufficiency of the charging document. *Johnston, supra.*

CONCLUSION

Ms. Stoken's convictions must be reversed; the tampering charge must be dismissed and the remaining charges remanded for a new trial. In the alternative, Ms. Stoken's sentence must be vacated.

Respectfully submitted on October 4, 2011.

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF MAILING

I certify that on today's date I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Rushelle Stoken, DOC #343851
Mission Creek Corrections Center for Women
3420 NE Sand Hill Road
Belfair, WA 98528

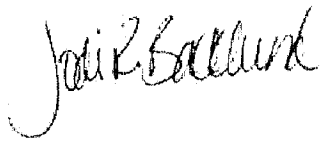
and to:

Grays Harbor Co Pros Ofc
102 W Broadway Ave Rm 102
Montesano WA 98563-3621

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 October 4, 2011.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

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