

No. 290859

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

TOBIAS ALLEN PRITCHARD,

Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIESii

I. ASSIGNMENTS OF ERROR 1

 A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR..... 1

 1. The trial court violated appellant’s rights under
 RCW 5.60.60(1)..... 1

 B. ANSWERS TO ASSIGNMENTS OF ERROR..... 1

 1. There was no violation of RCW 5.60.60 and in the alternative
 if the admissions were err, they were harmless court correctly
 denied Arreola’s motion to suppress 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT 1

IV. CONCLUSION 15

TABLE OF AUTHORITIES

PAGE

Cases

Barbee v. Lulong Firm, P.L.L.C., 126 Wn.App. 148,
107 P.3d 762 (2005) 8, 11

State v. Bonaparte, 34 Wn.App. 285, 660 P.2d 334 (1983)..... 5, 6

State v. Denton, 97 Wn.App. 267, 983 P.2d 693 (1999) 13

State v. Lewis, 15 Wn.App. 172, 548 P.2d 587,
review denied, 87 Wn.2d 1005 (1976)..... 14

State v. Tharp, 96 Wn.2d 591, 637 P.2d 961 (1981) 13

State v. Webb, 64 Wn.App. 480, 824 P.2d 1257,
review denied, 119 Wn.2d 1015 (1992)..... 12, 13

Rules and Statutes

RAP 10.3(b) 1

RCW 5.60.60 1, 7, 10, 12, 15

RCW 5.60.60(1) 1

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes one assignment of error;

1. The court violated appellant's rights under RCW 5.60.60(1).

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. There was no violation of RCW 5.60.60 and in the alternative if the admissions were err, they were harmless court correctly denied Arreola's motion to suppress.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to the record as needed.

III. ARGUMENT

The allegation was addressed at trial; however it was not raised and asserted by Pritchard. This issue was brought to the attention of the court by the State and when discussed amongst the parties there was never a statement by Pritchard that he was invoking the portion of the privilege which would completely preclude his wife from testifying.

Appellant now claims that he asserted the marital privilege at his trial. While it is correct that on the record trial counsel stated "We

would ask the privilege to be invoked” the rest of that specific section of the colloquy between trial counsel and the court is about how counsel does not believe the privilege is applicable to most of what the State is interested in and there is a specific request that the “statements” be disallowed. He then states the observations about the truck do not appear to be covered. There is nothing in this record that would confirm that this “privilege” was that Ms. Pritchard not be allowed to testify at all. The States position is bolstered by the totality of the conversation between trial counsel for appellant and the court;

HE COURT: Mr. Schuler.

MR. SCHULER: Your Honor, as I indicated this morning, she actually contacted me about this issue. I deferred her to Mr. Guzman. I didn't want any kind of witness tampering issues, not that I would engage in that. I did listen to her. She was very adamant about potential spousal privilege, also the fact that she indicated to me that she disputed a lot of what was being alleged that she said.

I guess I don't necessarily mind her being up there.

She indicated to me previously that she would indicate she was lying out of jealousy and anything that was said was based on that or stuff that was taken out of context. **She may end up being a witness for the defense as well as the state.**

THE COURT: Does she want to testify for you?

MR. SCHULER: I don't think she wants to testify at all. I don't think she wants to be involved is my impression. She was bringing up the spousal privilege quite a bit. I told her I couldn't advise her legally, that she needed to talk to the state.

THE COURT: Is your client asking to have the

spousal privilege invoked? If you read the statute, that's part of what has to be determined. Your client has to be the one --

MR. SCHULER: Yeah, absolutely.

THE COURT: -- indicating that he wants to invoke that privilege.

MR. SCHULER: Absolutely.

THE COURT: What you're telling me is you actually want her to testify.

MR. SCHULER: Well, I put the cart before the horse. I don't know what she's going to -- what's actually going to come out. **We may want her to testify.** I don't know what is going to come out when she's on the stand being grilled. **We would ask the privilege to be invoked.** I'll leave it up to your Honor. **I'm not sure it applies here.** **These weren't statements -- well, actually part of them were statements. We ask the statements be disallowed under spousal privilege. Her observations of a truck I don't think would come under that but any statements he made to her or allegedly made to her. I think there is statements regarding what he was telling her.**

THE COURT: **So you would acknowledge that if she is called to the stand and asked -- your representations about what vehicle he drove up in and doesn't go into any specifics of the conversation that may have taken place with Mr. Pritchard, that that would not be subject to the privilege?**

MR. SCHULER: **That's my understanding, your Honor.**

THE COURT: Okay. Mr. Guzman.

MR. GUZMAN: I think we're probably on the same page on that, your Honor. Again, I brought this up because I don't want it to become an appeal issue later. The whole marital privilege, my understanding in talking with Ms. Pritchard -- I believe it was early Friday morning she approached me at the jail courtroom. It was that she did not see who drove the truck to her home. She apparently did see Mr. Pritchard there with several other people. Thereafter, for whatever reason, they left before law enforcement arrived, that she did get the information off the vehicle. (Emphasis mine) (RP 12-15)

MR. SCHULER: Your Honor, we could get into the privilege if he told her where he's staying versus if she followed him there and saw his car.

THE COURT: Was that intended to be confidential? That's the question.

MR. SCHULER: He was with another lady. I don't know. That I don't know. (RP 19)

It is clear that the actual "privilege" being discussed during the trial was not that which is now raised on appeal. Appellant did not assert his right to have his wife not testify at all but that she not be allowed to testify about the communications which were made during the marriage which were meant to be private, made in confidence. Now the claim is that he asserted the privilege with regard to any and all acts or communications related to this marriage. If this was what actually occurred at trial, that his wife not be allowed to communicate anything, why would counsel state in the same conversation that some of the information was in the form of a "statement" which would not be admissible whereas "her observations of a truck I don't think would come under that..." Pritchard indicates in his brief that both Sonya and Tobias Pritchard invoked spousal privilege. 5/10/10 RP 12-13. (Appellant's brief at 3.) However in the pages cited Sonya is not present in court, counsel specifically states he does not represent her and there is no privilege which is invoked.

Even if this were to be analyzed as asserted in this appeal State v. Bonaparte, 34 Wn. App. 285, 660 P.2d 334 (1983) would appear to be controlling:

There are two distinct privileges contained in this statute. See generally *Bigelow, The Marital Privileges in Washington Law: Spouse Testimony and Marital Communications*, 54 Wash. L. Rev. 65, 67 (1978). The first is the testimonial privilege, which prevents a spouse from being examined as a witness for or against the other spouse without the consent of the other spouse. State v. Thorne, 43 Wn.2d 47, 55, 260 P.2d 331 (1953). The second is the confidential communications privilege, which prevents a spouse from being examined as to confidential communications made by one to the other during the marriage. Thorne.

There are different rationales for the two privileges. The testimonial privilege requires an existing marriage and endeavors to foster domestic harmony and prevent discord. Thorne. The communications privilege applies to all confidential exchanges and is intended to encourage mutual understanding and trust. Thorne.

It is his spousal testimonial privilege the defendant contends was violated by allowing Boggs to relate Mrs. Bonaparte's statements. He relies on State v. Clark, 26 Wn.2d 160, 173 P.2d 189 (1946), where the court said:

The statute [RCW 5.60.060] means just what it says. No spouse shall be examined as a witness for or against the other spouse without the consent of such spouse.

...

The testimonial privilege, however, has been severely criticized by commentators as lacking a modern policy rationale.

The privilege has sometimes been defended, after the manner in which we find reasons for inherited customs generally, as protecting family harmony. But family harmony is nearly always past saving when the spouse is willing to aid the prosecution.

C. McCormick, Evidence SS 66, at 145 (1954).

...

In two recent cases we have held that the testimonial privilege does not bar a spouse's statements offered to demonstrate probable cause rather than to prove the truth of the matter stated. This court in State v. Osborne, 18 Wn. App. 318, 569 P.2d 1176 (1977) upheld a search warrant based upon an officer's affidavit which recited statements made to him by the defendant's wife. We explained: "It is clear that evidence that would not be competent or admissible at trial may nevertheless furnish 'probable cause' for the issuance of a search warrant." Osborne, at 322. State v. Diana, 24 Wn. App. 908, 604 P.2d 1312 (1979) held that statements by the defendant's wife furnished the police with probable cause to enter the family house. Following the analysis in Osborne, the court in Diana held the privilege inapplicable. These previous decisions are controlling. We find no violation of the testimonial privilege here.

Bonaparte would appear to perfectly match the proffer made by the

State:

My understanding from Ms. Pritchard, her testimony, and it's per Deputy Moore's report. I wanted to make sure I'm not going beyond any spousal privilege. I was looking over the statute, 5.60.060 on marital privilege. It's my understanding the gist of her testimony will be that dispatch got called out. She talked to them about what happened, about Mr. Pritchard being at her home before they arrived and giving them the license plate number for the vehicle he was in, that she had heard that it was stolen, that he had stole it and he had been bragging to friends about that. She gave them the information that she had heard he was staying at the All Star Motel. That's how

they were able to go out to that area. I guess I just wanted to make clear before we go forward that we're not getting into any privilege that should not come in under the spousal privilege. I was reading the statute. From what I read, the reading of it and how I understand it, I don't think it would affect anything under that privilege. I just wanted to have that decided before we present any of that in front of a jury. (RP 9-10)

Appellant intended to have his wife take the stand. At trial counsel made a decision that the testimony of Ms. Pritchard could aid in the defense, which once again supports the State's position that at the trial court there was no assertion of the complete prohibition of testimony as set forth in RCW 5.60.60 but that of the second section pertaining to the use of a communication. (RP 12-13)

RCW 5.60.060. Who are disqualified - Privileged communications

(1) A spouse or domestic partner shall not be examined for or against his or her spouse or domestic partner, without the consent of the spouse or domestic partner; nor

can either during marriage or during the domestic partnership or afterward, be without the consent of the other, examined as to any communication made by one to the other during the marriage or the domestic partnership.

This court should also note that there was no objection made

by appellant to the ruling made by the trial court. Further, there was no objection to the testimony of Ms. Pritchard when she took the stand there were neither motions to dismiss at the close of the States case nor motions to set aside the verdict for these alleged violations.

Barbee v. Luong Firm, P.L.L.C., 126 Wn. App. 148, 156, 107 P.3d 762 (2005):

The confidential communications privilege belongs to, or may be asserted by, the communicating spouse; the hearing or receiving spouse is ordinarily not entitled to object. *Swearingen*, 51 Wash.2d at 848, 322 P.2d 876. The spouse who possesses the privilege may waive it. "The waiver may be found in some extrajudicial disclosure, or in some act of testimony which in fairness places the person in a position not to object consistently to further disclosure." *Swearingen*, 51 Wash.2d at 848, 322 P.2d 876 (quoting 8 Wigmore on Evidence (2nd ed.) 658-59, § 2340). Thus, when the communication is heard by others, it is not protected. The third party who hears it may testify to it, *Thorne*, 43 Wash.2d at 56, 260 P.2d 331; and the hearing spouse may testify to it if not prevented from doing so by the testimonial privilege. *State v. Wilder*, 12 Wash.App. 296, 299, 529 P.2d 1109 (1974).

Appellant made good use of Ms. Pritchard while she was on the stand in an attempt to show that the information which was presented by the State was not sufficient to support the charge of Possession of a Stolen Vehicle as was outlined in closing by trial

counsel;

Sonja came in, his wife, and indicated that initially she said some things about him that she shouldn't have. She was angry and understandably so. They have kids together, married. He relapsed back into drug use and left his family for this girlfriend. Of course, she's angry, and she acted out of scorn. She admitted that on the stand. I told the officer things about him I shouldn't have. I was angry. They weren't true. She came clean and said that when she got there she didn't see who was driving. There was this Linda and Mr. Pritchard with some friends there. She cleared it up, and he indicated these friends were with them as well.

(RP 165)

Pritchard's defense strategy was to show that his wife never saw him drive the truck in question; that the one person who saw him driving the truck, the motel keeper, was taking drugs for the use of the room; that the keys for the truck when found were near to the female items which were obviously associated with his partner of the time a person with whom appellant associated for the purpose of using drugs and that she was the person who had "borrowed" the truck and also a trailer. This was furthered by the statements made by Ms. Pritchard elicited by defense counsel that the persons with appellant when they came to her home were not the type of people she wanted in her home. They make use of the fact that the "girl friend" "who unfortunately is not here to help clear some things up." (RP 163), Q. For the record, who's Linda? - A. Linda was a girl I met when I

ran away from home. - Q. This is Linda Galvan? A. Yeah. - Q. Has she been here to testify yet? A. No. (RP 127)

Of course it is apparent that the problem with this defense is it did not work. Trial counsel placed on the record that this was a difficult case to defend against and that it was his clients wish to proceed to trial. “This is potentially very, very damaging to his case. I explained that to him. This is a tough case as it was. This really makes it that much tougher.” (RP 3)

With regard to the “second section” of RCW 5.60.60 the trial court did an admirable job of limiting the information which was allowed in as testimony. The State agreed with the ruling and was actually the proponent of having the issue addressed by the trial court and limitation imposed so that there would not be an issue on appeal.

Counsel for Pritchard was in full agreement with the rulings, he never once objected to the actions taken by the trial court with regard to any “communication” which was addressed by the trial court. This ruling covers eight pages and involves extensive conversation between defense counsel and the court on the strategy of Pritchard in having the testimony of his wife come before the jury and to what extent that should be allowed. Once again it MUST be pointed out that this entire conversation is about the admission of Mrs. Pritchard’s testimony not the complete and total

prohibition of that testimony which appellant now alleges that he asserted.

(RP 30-38)

Barbee v. Luong Firm, P.L.L.C., 126 Wn. App. 148, 159, 107 P.3d

762 (2005):

It is true that privileges are narrowly construed to serve their purposes so as to exclude the least amount of relevant evidence. *Burden*, 120 Wash.2d at 377, 841 P.2d 758. Moreover, "the privilege to bar a spouse's adverse testimony, particularly when no confidential communications are involved, is not highly favored by legal commentators." *Wood*, 52 Wash.App. at 163, 758 P.2d 530 ... Nevertheless, a trial court does not have discretion to refuse to give effect to the statutory testimonial privilege where it directly applies. *State v. White*, 50 Wash.App. 858, 751 P.2d 1202 (1988). Once the privilege is asserted, "one spouse is then incompetent to testify for or against the other as to *all* matters, and the restriction is not limited merely to confidential communications between them." *State v. Tanner*, 54 Wash.2d 535, 537, 341 P.2d 869 (1959).

Barbee acknowledges that in order to preserve the testimonial privilege she must make an appropriate objection Before James testifies. See *State v. Tanner*, 54 Wash.2d at 537, 341 P.2d 869. (Emphasis mine.)

The court allowed in the information gathered by Ms. Pritchard with regard to the stolen truck being in her driveway and the State did not question her with regard to the allegation that she said that her husband, the appellant, was driving this vehicle. Once again that would not have

been a communication it was an observation which is not protected under RCW 5.60.60.

Appellant also alleges that the trial court carved out a new exception for “visitation.” However, it is clear to the State that the court was not saying that this was some new exception, but was in fact indicating that this was not a communication made in the marriage meant to be part of the communication kept safe by statute, it was in effect a statement made about the location of the child not a “communication.” This was mere recitation of the geographical place where the child, not Mr. Pritchard’s biological child, his step child could be located in case Mrs. Pritchard needed to come find her. The court was not setting forth and new exception, the court was indicating this did not fall under the existing edicts of the RCW 5.60.60.

In the final analysis even if this court were to find that the admission of any of this information was covered by RCW .560.60 and should have been excluded the law regarding this type of admission is clear.

Marital privilege challenges are evidentiary challenges that do not rise to the level of constitutional magnitude. See State v. Webb, 64 Wn. App. 480, 488, 824 P.2d 1257 “Error that is not of constitutional magnitude is harmless unless there is a reasonable probability, in light of

the entire record, that the error materially affected the outcome of the trial.”, *review denied*, 119 Wn.2d 1015 (1992); see also State v. Denton, 97 Wn. App. 267, 271-72, 983 P.2d 693 (1999) (analyzing spousal testimonial privilege under an admission of evidence standard). An evidentiary rule error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

A complete reading of the verbatim report of proceedings demonstrates that even if there was some err on the part of the trial court that err was harmless. Appellant never challenged the search warrant that was issued and served on the room that he was renting. To state as appellant has, that the jury would not have heard about the All Star Motel but for the actions of the trial court erroneously “forcing” Mrs. Pritchard to testify is absurd. Any and all of the officers involved in the issuance and search could have and in fact two did testify to the fact that they arrested Pritchard from within room 142, the room rented by he and his girlfriend, the room he admitted being in, that the stated he was passed out in from using too much meth, the room that contained the keys which fit the stolen truck which was parked in front of that very same room, in stall specifically for that room. A truck that the hotel keeper testified she

observed appellant driving and truck that appellant himself admitted to driving.

The fact is the jury did not believe the “story” that was concocted by the appellant and his wife as to how this all came about. This would include the fact that the wife did not “know” the truck was stolen when she told the police that fact, apparently this was just a lucky guess which she later, under oath, recanted. Another lucky guess which was made to the police, that the appellant was driving the truck when he left her home, which also apparently was also either stated as a lie or was a fact concocted by the police.

The allegation that the trial court erred is unfounded. Appellant now stands before this court to argue that what he agreed with in the trial court was in fact a violation of his spousal privilege. However trial counsel used this privilege to his advantage. He was able to have admitted information that supported the defense theory while using the same privilege to exclude information they did not want admitted. To now come before this court and claim error raises the issue of invited error. State v. Lewis, 15 Wn. App. 172, 177, 548 P.2d 587, *review denied*, 87 Wn.2d 1005 (1976);

We hold, therefore, that when a defendant in the procedural setting of a criminal trial makes a tactical choice in pursuit of some

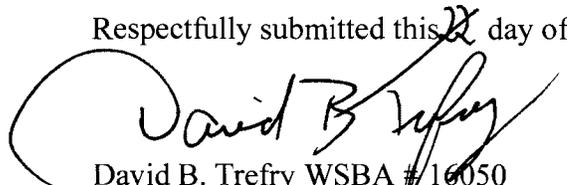
real or hoped for advantage, he may not later urge his own action as a ground for reversing his conviction even though he may have acted to deprive himself of some constitutional right. A criminal defendant is entitled to a fair trial from the state, including due process. He is not denied due process by the state when such denial results from his own act, nor may the state be required to protect him from himself.

IV. CONCLUSION

This appeal has no merit. Appellant has not demonstrated to this court that the trial committed any error when it allowed limited testimony from appellants wife. Appellant did not assert the privilege set forth in the first section of RCW 5.60.60. The testimony was not objected to by appellant and in fact much of the testimony was used as a basis for his defense. Even if there was limited error in the ruling by the trial court it was harmless as best and invited by the actions of the appellant in the trial court.

The actions of the trial court should be upheld and this appeal should be dismissed.

Respectfully submitted this 22 day of June 2011



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