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Court of Appeals
Division III
State of Washington

No. 30132-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Michael Winn,

Appellant.

Yakima County Superior Court Cause No. 10-1-01218-0

The Honorable Judge Ruth Reukauf

Appellant's Reply Brief

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ARGUMENT

I. THE ILLEGALLY RECORDED CONVERSATIONS SHOULD HAVE BEEN EXCLUDED.

The Privacy Act is to be strictly construed in favor of personal privacy. *State v. Christensen*, 153 Wash.2d 186, 201, 102 P.3d 789 (2004); *State v. Williams*, 94 Wash.2d 531, 548, 617 P.2d 1012 (1980). Recorded evidence is inadmissible unless there was strict compliance with the Act's requirements. RCW 9.73.050; *State v. Costello*, 84 Wash.App. 150, 154, 925 P.2d 1296 (1996). Law enforcement may record a private conversation with consent from one party, but only after a probable cause determination by a neutral magistrate. RCW 9.73.090(2).

The application for such authorization must be "made in writing upon oath or affirmation..." RCW 9.73.130. It must also include "[a] particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ..." RCW 9.73.130(3)(f).

A. The application was not "made in writing upon oath or affirmation."

Here, the application was not made in writing upon oath or affirmation. The written application was unsigned, and there is no

contemporaneous record of any verbally administered oath or affirmation. CP 35-39; RP (3/15/11) 96. The detective's *post-hoc* declaration cannot, consistent with the Act's purpose and the rules regarding its construction, substitute for a contemporaneous record of the oath. CP 45. This is especially true given the judge's inability to recall whether or not the oath was administered. CP 120.

The issue is not merely whether or not an oath was verbally administered, as Respondent implies. Brief of Respondent, pp. 6-7. Even if the statute does not require the oath to be in writing and signed,¹ there must at least be a contemporaneous record of the oath. Otherwise, individual rights under the Privacy Act will depend on the memory and honesty of parties who may have an interest in the admission of evidence.²

Respondent relies on *Costello*, arguing in favor of a good faith exception to RCW 9.73.170. Brief of Respondent, pp. 4-6. Even if Respondent is correct, Mr. Winn's convictions must nonetheless be reversed. As Respondent concedes, a finding of good faith does not

¹ Despite the requirement that the application be "made in writing upon oath or affirmation..." RCW 9.73.130.

² Furthermore, there is no indication regarding the form of any oath verbally administered by the judge. Thus, even considering Detective Janis's affidavit, the record does not conclusively establish compliance with RCW 5.28 (which relates to the form of an oath or affirmation).

permit the recording itself to be admitted at trial. Brief of Respondent, p. 7.

The recording was admitted at Mr. Winn's trial. Ex. 14, 15. Mr. Winn's failure to deny H.D.A.'s claims undoubtedly contributed to the jury's guilty verdicts. Had the recording been excluded, it is likely jurors would have voted to acquit. Contrary to Respondent's assertion, the evidence of guilt was not "overwhelming." Brief of Respondent, p. 8. Instead, apart from the recording, the prosecutor's case rested entirely on H.D.A.'s testimony. Without the corroboration—however slight—provided by the illegal recording, the jury's assessment of H.D.A.'s credibility might well have been different.

Accordingly, Mr. Winn's convictions must be reversed, and the recorded conversation suppressed, along with any evidence related to or derived from the recording. *State v. Fjermestad*, 114 Wash.2d 828, 835-837, 791 P.2d 897 (1990).

B. The application lacked a particularized showing of need.

The application for authorization to record pertained to crimes completed more than one year before the start of the investigation. It did not establish why it would be impractical or dangerous to interview Mr. Winn, to interview family members, to examine the residence, or to obtain

a search warrant. In fact, the detective pursued these other options while investigating the case. CP 23-27; RP (6/20/11) 106.

Respondent does not argue that the application included the facts required under RCW 9.73.130(3)(f). Brief of Respondent, pp. 2-10.

Respondent's silence on this point may be treated as a concession. *See In re Pullman*, 167 Wash.2d 205, 212 n.4, 218 P.3d 913 (2009).

Accordingly, the evidence must be suppressed, the convictions reversed, and the case remanded for a new trial. *Fjermestad*, at 835-837.

II. PROSECUTORIAL MISCONDUCT REQUIRES REVERSAL.

A. The prosecutor improperly vouched for the evidence and sought conviction based on matters outside the record.

During closing argument, the prosecutor expressed his personal opinion numerous times. RP (6/22/11) 455, 457. The prosecutor also told jurors that "No prosecutor would have any concerns about the evidence in this case." RP (6/22/11) 457. In essence, these remarks communicated to the jury "I believe H.D.A." and "Any experienced person would believe H.D.A." These comments were improper, unfair, and prejudicial. *State v. Russell*, 125 Wash.2d 24, 87, 882 P.2d 747 (1994).

Respondent argues that the prosecutor's personal opinion about the evidence and his assessment of how other prosecutors would view the case "are not facts." Brief of Respondent, p. 11. This is a peculiar assertion for

an attorney to make. If Respondent is attempting to differentiate between opinions and other kinds of information, the argument is irrelevant—a prosecutor may not rely on extrinsic facts, in any form. Respondent is correct that the statements would not be *admissible* as opinion testimony at trial; however, no court has ever suggested that an evidentiary ruling on admissibility could turn information into something else. If Respondent means to dispute the truth of the prosecutor’s statements—i.e. by suggesting that Mr. Soukup did not actually possess the opinions he professed, or that other prosecutors would have concerns about the evidence—then Respondent’s argument, again, is irrelevant. The prohibition against arguing extrinsic facts does not depend on the truth or falsity of those facts.

These comments were extremely prejudicial. The prosecution’s case depended heavily on H.D.A.’s credibility. By forcefully declaring his own opinion—and by referring jurors to the opinions of other prosecutors—Mr. Soukup impermissibly bolstered H.D.A.’s testimony.

This violated Mr. Winn’s right to a jury trial and his right to due process. *Russell, supra; State v. Horton*, 116 Wash.App. 909, 921, 68 P.3d 1145 (2003). His convictions must be reversed and the case remanded for a new trial. *Id.*

- B. The prosecutor infringed Mr. Winn’s constitutional right to counsel by disparaging the role of defense counsel and impugning counsel’s integrity.

Mr. Winn rests on the argument set forth in the Opening Brief.

III. THE TRIAL COURT INFRINGED MR. WINN’S RIGHT TO CONFRONT ADVERSE WITNESSES.

The constitution guarantees an accused person the right to cross-examine adverse witnesses on matters affecting credibility and bias. *State v. Darden*, 145 Wash.2d 612, 620, 41 P.3d 1189 (2002). This includes questioning to expose specific instances of misconduct—including uncharged thefts. ER 608; *see United States v. Manske*, 186 F.3d 770, 776 (7th Cir. 1999) (listing cases); *United States v. Smith*, 80 F.3d 1188, 1193 (7th Cir. 1996).

Uncharged misconduct may also give rise to an inference of bias, and therefore is admissible for that purpose as well. *United States v. Martin*, 618 F.3d 705, 727 (7th Cir. 2010); *see also United States v. Sarracino*, 340 F.3d 1148, 1167 (10th Cir. 2003); *Alford v. United States*, 282 U.S. 687, 693, 51 S.Ct. 218, 75 L.Ed. 624 (1931); *see also Davis v. Alaska*, 415 U.S. 308, 319-320, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974); *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986) *United States v. Anderson*, 881 F.2d 1128, 1138 (D.C. Cir. 1989). This is true even if there is no explicit agreement with the

prosecution. *Martin*, at 727-730. The uncharged misconduct—and the potential consequences of the misconduct—create bias in the mind of the witness, regardless of whether or not the government seeks to invoke those potential consequences. *Id.* Indeed, the witness need not even be aware of her or his own bias; the exposure of a witness’s unconscious bias is a proper object of cross-examination. *See, e.g., United States v. Abel*, 469 U.S. 45, 52, 105 S. Ct. 465, 469, 83 L. Ed. 2d 450 (1984) (“Bias is a term used...to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party.”) Exclusion of such evidence violates the confrontation clause. *Id.*; *State v. Spencer*, 111 Wash.App. 401, 408, 45 P.3d 209 (2002).

The judge erroneously denied Mr. Winn the opportunity to cross-examine H.D.A. regarding uncharged thefts and other criminal misconduct. RP (6/17/11) 41-77. The error was prejudicial, because H.D.A. was the main witness, her credibility was important to the prosecution’s case, evidence of uncharged thefts and other misconduct was available to attack her credibility and to show bias,³ and no substantial countervailing interest favored exclusion. *See Darden*, at 621.

³ Respondent faults Mr. Winn for describing defense counsel’s cross examination as “significant” in the statement of facts and “weak impeachment by contradiction” in the argument on this issue. Brief of Respondent, pp. 26-27. The word “significant” (in the

Respondent does not dispute that the uncharged thefts were relevant and admissible under ER 608. Brief of Respondent, pp. 26-36. This silence can be taken as a concession. *Pullman*, at 212 n.4. Respondent’s argument (that the record does not mention “immunity,” that the “alleged motive or bias is made from whole cloth,” and that the “[t]his alleged error is based on nothing”) is without merit. Brief of Respondent, p. 35.

Bias is presumed from the circumstances—the existence of uncharged misconduct (including felony misconduct); as noted above, it is not dependent on an explicit agreement, and the witness need not even be aware of her bias. *Martin*, at 727-730; *Abel*, at 52. The evidence should have been admitted. *Spencer*, at 408

By excluding the evidence, the trial judge violated Mr. Winn’s confrontation right. *Spencer*, at 408. The convictions must be reversed and the case remanded for a new trial. *Id.*

CONCLUSION

For the foregoing reasons, Mr. Winn’s convictions must be reversed and the case remanded for a new trial.

opening brief) was intended to convey the duration of the cross-examination; it was not meant to suggest its strength or its effect on the jury. *See* Appellant’s Opening Brief (Second Corrected Copy) p. 6.

Respectfully submitted this July 17, 2012.

BACKLUND AND MISTRY

A handwritten signature in blue ink that reads "Jodi R. Backlund". The signature is written in a cursive style with a large initial "J".

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division III, 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 July 17, 2012.



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