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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 Opening Brief

(Second Corrected Copy)

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ASSIGNMENTS OF ERROR

1. The trial court erred by admitting a recording of a telephone conversation that was obtained in violation of the Privacy Act.
2. Detective Janis violated Mr. Winn's rights under the Privacy Act by failing to strictly comply with the requirements for obtaining authorization to record a telephone conversation.
3. The prosecutor committed misconduct that infringed Mr. Winn's Sixth and Fourteenth Amendment rights to counsel, to due process, to a jury trial, and to a decision based solely on the evidence introduced at trial.
4. The prosecutor improperly expressed a personal opinion in closing arguments.
5. The prosecutor improperly maligned the role of defense counsel in closing arguments.
6. The trial court violated Mr. Winn's Sixth and Fourteenth Amendment right to confront adverse witnesses.
7. The trial court violated Mr. Winn's confrontation right under Wash. Const. Article 1, Section 22.
8. The trial court erred by refusing to allow Mr. Winn to cross-examine H.A. regarding thefts she had committed.

9. The trial court erred by refusing to allow Mr. Winn to cross-examine H.A. regarding her drug dealing.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under Washington's Privacy Act, a telephone conversation recorded under authority of a court order is inadmissible in court unless the officer making the recording strictly complies with the provisions of the Act. Here, Detective Janis failed to sign his written application under oath, and any oral oath was not recorded or reduced to writing. Did the erroneous admission of an illegally recorded telephone call violate Mr. Winn's rights under the Privacy Act?
2. A prosecutor may not express a personal opinion regarding the credibility of the evidence. Here, the prosecutor expressed his personal opinion that the evidence was credible and sufficient for conviction. Did the prosecutor commit reversible misconduct?
3. A prosecutor may not disparage the role of defense counsel. Here, the prosecutor disparaged defense counsel and the defense function in his closing argument. Did the prosecutor's

misconduct violate Mr. Winn's Sixth and Fourteenth Amendment rights to counsel and to due process?

4. An accused person has the constitutional right to confront adverse witnesses. Here, the trial court restricted Mr. Winn's opportunity to cross-examine H.A. regarding matters affecting credibility and bias. Did the restriction on cross-examination violate Mr. Winn's confrontation rights under the Sixth and Fourteenth Amendments and Wash. Const. Article I, Section 22?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Sixteen year old H.D.A. was given a choice by her mother to either go to drug treatment or move out of the family home. She chose to move out. RP (6/20/11) 155; RP (6/21/11) 269. Once out, she alleged that she'd had an eight-year "affair" with her mother's boyfriend that started when H.D.A. was eight years old. RP (6/20/11) 126-152, 158.

Detective Janis sought permission to record a phone conversation between H.D.A. and Mr. Winn. He prepared an application for permission to record, but failed to sign it under oath. He spoke with the court in order to obtain the permission, and that conversation was not recorded. CP 35-39. H.D.A. called Mr. Winn several times in one day, and they spoke once at some length. Ex. 15.

The state charged Mr. Winn with Child Molestation in the First Degree, Rape of a Child in the Second Degree, Rape of a Child in the Third Degree, Child Molestation in the Second Degree, and Child Molestation in the Third Degree.¹ CP 180-182.

Mr. Winn sought to suppress the recording of his telephone conversation with H.D.A. CP 5, 6-27, 46-50, 52, 57-59, 60-65, 66-70, 143-150. The trial court held several hearings, and ultimately admitted the

¹ A charge of incest was dismissed.

recording. The court held that an application for a warrant to record a telephone conversation need not be signed under oath. RP (11/17/10) 54; RP (3/15/11) 95-97, 101-102; CP 118-120.

The recorded conversation was played for the jury at trial. Ex. 15. During the telephone call, Mr. Winn did not acknowledge any improper touching; however, the prosecutor emphasized that he'd failed to deny H.D.A.'s allegations that they'd had a sexual relationship. RP (6/21/11) 365-374; RP (6/22/11) 461, 470-471, 516, 524.

Mr. Winn's trial theory was that sixteen-year-old H.A. fabricated allegations of sexual abuse. *See RP generally.* To show H.A.'s bias and lack of credibility, Mr. Winn sought to cross examine her regarding some of the specific incidents of misconduct that precipitated her mother's demand that she leave the home. These included a number of thefts from the family (including theft of her mother's medications), thefts from her employer, and drug dealing activity. RP (6/17/11) 41-46, 57-60.

The trial judge refused to allow cross-examination on these topics. RP (6/17/11) 74-77. Instead, the court allowed Mr. Winn to ask H.A. if some of her behaviors included unspecified violations of law. RP (6/17/11) 76.

The defense challenges to H.D.A.'s credibility also included multiple offers of proof, ultimately denied: on the mother's explanation to

H.D.A. of her experience with molestation as a child which was similar to H.D.A.'s story of her own, on H.D.A.'s alleged gang involvement, and that H.D.A.'s description of Mr. Winn's genitalia did not match the reality. RP (6/17/11) 33-56, 74-77. It also consisted of significant cross-examination of H.D.A. on details regarding Mr. Winn's anatomy, the specifics of her allegations about what she had done with Mr. Winn, and the family's dynamics. RP (6/21/11) 171-232.

During closing argument, the prosecutor said: "...I know when I try a case in which the allegation is sexual abuse--" RP (6/22/11) 455. Mr. Winn objected to the prosecutor's use of the personal pronoun "I;" the court sustained the objection. RP (6/22/11) 455. Then the prosecutor continued:

MR. SOUKUP: Well, any prosecutor that prosecutes a case involving sexual abuse of children, they know that it's different than prosecuting a theft. It's different than prosecuting an assault or a robbery. The difference is that people on the jury might never commit a theft, but they understand why someone would want something....

On the other hand, in these cases, it's hard for the vast majority of the population to understand the motivation and really to believe that there's actually people down in your gut that are sexually attracted to children, in the first place, and would actually act on that in the second place. So that's what I'm up against in this case. You overlay that with people like Mr. Klein and others that say, oh, there's all these false allegations of child abuse running around. We have to be careful of giving the babysitter a ride home and things like that. Well, that's not the situation we have here....

I would suggest to you that that case itself is very, very strong....

No, ladies and gentlemen, I have no concerns about the evidence in this case.

MR. KLEIN: Objection, Judge. That's four.

THE COURT: Sustained.

MR. [SOUKUP]: No prosecutor would have any concerns about the evidence in this case. The things I'm concerned about are sympathy, prejudice and personal preference.

MR. KLEIN: Objection, Judge, five.

THE COURT: Let's have a sidebar. Excuse us, please.

RP (6/22/11) 455-457.

During his rebuttal closing, the prosecutor again addressed the role of defense counsel:

Mr. Klein's job is to get the best possible result that he can for his client. Your job is to uphold the oath you took to apply the law to the facts of this case.

RP (6/22/11) 506-507.

The jury convicted on all charges. RP (6/22/11) 531-535. Mr.

Winn was given a sentence of 245 months. RP (8/8/11) 197; CP 247-256.

He timely appealed. CP 267.

ARGUMENT

I. THE TRIAL JUDGE VIOLATED MR. WINN'S RIGHTS UNDER THE PRIVACY ACT BY ADMITTING ILLEGALLY RECORDED CONVERSATIONS.

A. Standard of Review

Questions of statutory interpretation are reviewed *de novo*. *State v. Engel*, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009). The admission of evidence obtained in violation of the Privacy Act requires reversal unless “within reasonable probability, the erroneous admission of the evidence did not materially affect the outcome of the trial.” *State v. Porter*, 98 Wash.App. 631, 638, 990 P.2d 460 (1999).

B. Any recording of a private telephone conversation is inadmissible unless obtained in strict compliance with the requirements of the Privacy Act.

Washington's Privacy Act “puts a high value on the privacy of communications.” *State v. Christensen*, 153 Wash.2d 186, 201, 102 P.3d 789 (2004). The legislature “intended to establish protections for individuals' privacy and to require suppression of recordings of even conversations relating to unlawful matters if the recordings were obtained in violation of the statutory requirements.” *State v. Williams*, 94 Wash.2d 531, 548, 617 P.2d 1012 (1980).

The Act must be strictly construed in favor of the right to privacy. *Williams*, at 548; *see also Christensen*, at 201. Furthermore, to be admissible, any recording must be made in strict compliance with the Act's provisions. *See, e.g., State v. Costello*, 84 Wash.App. 150, 154, 925 P.2d 1296 (1996) (addressing RCW 9.73.210).

The Act allows law enforcement to record a private conversation with the consent of one party, if authorized by a judge or magistrate upon a showing of probable cause. RCW 9.73.090(2). The requirements for obtaining authorization are set forth in RCW 9.73.130, which provides (in relevant part) as follows:

Each application for an authorization to record communications or conversations pursuant to RCW 9.73.090 as now or hereafter amended shall be made in writing upon oath or affirmation and shall state: ... (3) A particular statement of the facts relied upon by the applicant to justify his or her belief that an authorization should be issued, including: ... (f) 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.

Recordings made in violation of the Privacy Act are inadmissible in court. RCW 9.73.050. The same is true for any evidence related to or derived from such recordings, including the testimony of witnesses to the illegally recorded conversation. *See, e.g., State v. Fjermestad*, 114 Wash.2d 828, 835, 791 P.2d 897 (1990) ("the exclusionary rule of RCW

9.73.050 is all encompassing to include any information obtained while using unauthorized electronic broadcasts, including visual observations and assertive conduct.”)

C. The application in this case was not made “in writing upon oath or affirmation.”

Under the statute, “[e]ach application for an authorization to record communications or conversations... shall be made in writing upon oath or affirmation.” RCW 9.73.130. The application in this case did not strictly comply with this requirement because there is no record of any oath or affirmation supporting the officer’s account. CP 35-39; RP (3/15/11) 96. In fact, the application did not even comply with the standard for telephonic requests, which requires a contemporaneous recording of the application, which is to be reduced to writing as soon as possible, and retained by the court. *See* RCW 9.73.090(2).

Accordingly, the recorded conversation, and any evidence related thereto should have been suppressed. *Fjermestad*, at 835-837. Mr. Winn’s convictions must be reversed and the case remanded for a new trial. *Id.*

D. The application in this case did not demonstrate a particularized showing of need for the recording.

Before authorization can be given, the investigating officer must make a “particularized showing of need.” *Porter*, at 635. The statute requires “[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). Police “need not make a showing of absolute necessity;” however, something more than general boilerplate is required. *Id*; see *State v. Manning*, 81 Wash.App. 714, 720, 915 P.2d 1162 (1996) (declaring that “[b]oilerplate is antithetical to the statute’s particularity requirement.”)

In *Porter*, the Court of Appeals suppressed a recorded conversation made by police in a drug possession case. In reaching its decision, the Court commented that

[t]he usual investigative technique [in drug possession cases] is to obtain a warrant to search the suspect’s premises, or to arrest the suspect for some other reason and conduct an incident search. The intercept affidavit does not allege that these methods, or, for that matter, any other methods, were tried or were unlikely to succeed. In fact, there is no indication that the Yakima police tried, or even considered, other investigative techniques... Moreover, a successful conviction for possession generally requires that the State produce the actual drugs found in the suspect’s actual or constructive possession. The affidavit here does not suggest what taped conversations would add to a successful prosecution if drugs

were found in Mr. Porter's possession, or what deficiencies in the proof such conversations would remedy if no drugs were found.

Porter, at 635-636 (footnotes omitted).

In this case, the application alleged that Mr. Winn had molested and raped H. over an eight year period, starting when she was eight. At the time of the application, the alleged crimes had been completed, with the last offense purportedly taking place more than one year prior. The purpose of the telephone conversation was apparently to prompt Mr. Winn to confess or at least to make incriminating statements. Ex. 15. Nothing in the application explained why it was impractical to simply interview Mr. Winn, which is the usual procedure in sex abuse cases. CP 35-39. Had the detective conducted a noncustodial interview, Mr. Winn could even have been questioned without benefit of *Miranda* warnings. See *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Nor did the detective explain why it was impractical to obtain evidence through other normal means.² For example, the detective could have interviewed family members,³ visited the house to observe the

² The detective provided no information suggesting any particular urgency: there was no indication that H. would be returning to Mr. Winn's household, or that she would be in danger of having unwanted contact with him. CP 35-39.

³ Even if the mother proved uncooperative, nothing prevented the detective from interviewing H.D.A.'s two sisters.

arrangement of rooms, or obtained a search warrant allowing seizure of items of evidentiary value. Indeed, the officer was able to obtain two search warrants without using any information obtained through the recorded conversation.⁴ CP 23-27; RP (6/20/11) 106.

The application was wholly deficient, because it failed to 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). The detective had a range of investigatory options that did not involve recording a private telephone conversation. He later pursued some of those options, interviewing other family members and obtaining search warrants for Mr. Winn’s house. CP 23-27; RP (6/20/11) 106.

Because the detective failed to strictly comply with RCW 9.73.130, the recorded conversation and any related information should have been suppressed. *Fjermestad*, at 835-837. The admission of the recordings materially affected the outcome of trial. Accordingly, the convictions must be reversed, the evidence excluded, and the case remanded for a new trial. *Porter*, at 638.

⁴ The warrant applications did mention the recorded conversation.

II. THE PROSECUTOR COMMITTED MISCONDUCT THAT VIOLATED MR. WINN'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO A JURY TRIAL, TO DUE PROCESS, AND TO A DECISION BASED SOLELY ON THE EVIDENCE.

A. Standard of Review

Alleged constitutional violations are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed.⁵ *State v. Toth*, 152 Wash.App. 610, 615, 217 P.3d 377 (2009).

To overcome the presumption of prejudice, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *City of Bellevue v. Lorang*, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

⁵ Prosecutorial misconduct that does not affect a constitutional right requires reversal whenever there is a substantial likelihood that the misconduct affected the verdict. *State v. Henderson*, 100 Wash.App. 794, 800, 998 P.2d 907 (2000).

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

The constitutional right to a jury trial includes the right to a verdict based solely on the evidence developed at trial. U.S. Const. Amend. VI; *Turner v. Louisiana*, 379 U.S. 466, 472, 85 S. Ct. 546, 13 L. Ed. 2d 424 (1965). The due process clause affords a similar protection. U.S. Const. XIV; *Sheppard v. Maxwell*, 384 U.S. 333, 335, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966).

It is misconduct for a prosecutor to vouch for evidence or otherwise suggest information not presented at trial supports conviction. *State v. Jones*, 144 Wash.App. 284, 293-94, 183 P.3d 307 (2008); *State v. Perez-Mejia*, 134 Wash.App. 907, 916, 143 P.3d 838 (2006). Comments encouraging a jury to base a verdict on facts not in evidence are improper. *State v. Stith*, 71 Wash.App. 14, 856 P.2d 415 (1993). "A prosecutor may not suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty." *State v. Russell*, 125 Wash.2d 24, 87, 882 P.2d 747 (1994). See also *State v. Martin*, 69 Wash.App. 686, 849 P.2d 1289 (1993).

It is misconduct for a prosecutor to express a personal opinion as to the credibility of a witness. *State v. Horton*, 116 Wash.App. 909, 921, 68 P.3d 1145 (2003); *State v. Reed*, 102 Wash.2d 140, 684 P.2d 699 (1984);

United States v. Frederick, 78 F.3d 1370, 1378 (9th Cir. 1996), citing *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir.1980), cert. denied, 452 U.S. 942, 101 S.Ct. 3088, 69 L.Ed.2d 957 (1981). Indirect vouching occurs when evidence suggests that information not presented to the jury supports the witness' testimony. *Frederick*, at 1378. This "may occur more subtly than personal vouching, and is also more susceptible to abuse." *Frederick*, at 1378.

In this case, the prosecutor explicitly vouched for the evidence during his closing argument. Even after being cautioned that using the pronoun "I" was inappropriate, the prosecutor said "I would suggest to you that that case itself is very, very strong," told the jury that H. "testified very well," and finished by saying, "I have no concerns about the evidence in this case." RP (6/22/11) 455, 457. Following another objection, the prosecutor told the jury that "No prosecutor would have any concerns about the evidence in this case," and then said, "The things I'm concerned about are sympathy, prejudice and personal preference." RP (6/22/11) 457.

The prosecutor's "I" statements directly vouched for the evidence; the claim that "No prosecutor would have any concerns about the evidence" indirectly vouched by suggesting that facts not in evidence (the collective wisdom of all prosecuting attorneys) supported conviction.

These comments were extremely prejudicial, and forced Mr. Winn to choose between his “valued right to have his trial completed by a particular tribunal” and his right to a decision based on the evidence introduced at trial. *Arizona v. Washington*, 434 U.S. 497, 503, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978) (quoting *Wade v. Hunter*, 336 U.S. 684, 689, 69 S. Ct. 834, 93 L.Ed. 974 (1949)); *Turner, supra*; *Sheppard, supra*. Although Mr. Winn’s objections were sustained, the court did not instruct jurors to disregard the prosecutor’s comments; furthermore, any ameliorative instruction would only have highlighted the offending argument. As many courts have noted, “[a] bell once rung cannot be unring.” *State v. Easter*, 130 Wash.2d 228, 230-239, 922 P.2d 1285 (1996) (internal citations omitted).

This indirect vouching and reliance on “facts” outside the record robbed Mr. Winn of his right to a jury verdict free from improper influence. *Russell, supra*; *Horton, supra*. It violated his rights to a jury trial and due process. *Id.* For these reasons, his convictions must be reversed and a new trial granted. *Id.*

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

It is improper for a prosecuting attorney to comment disparagingly on defense counsel’s role or to impugn the defense lawyer’s integrity. *State v. Thorgerson*, 172 Wash.2d 438, 451-452, 258 P.3d 43 (2011)

(citing *State v. Warren*, 165 Wash.2d 17, 195 P.3d 940 (2008) and *State v. Negrete*, 72 Wash.App. 62, 67, 863 P.2d 137 (1993)). Thus, for example, a prosecutor who characterizes defense counsel's presentation "as 'bogus' and involving 'sleight of hand'" improperly impugns counsel's integrity. *Thorgerson*, at 451-452.

In this case, the prosecuting attorney engaged in a subtler form of disparagement, by comparing defense counsel's role ("to get the best possible result that he can for his client") with the jury's role ("to uphold the oath you took to apply the law to the facts.") RP (6/22/11) 506. This juxtaposition improperly suggested that defense counsel's role involved something antithetical to the jury's role, thereby disparaging defense counsel and maligning the defense role. The argument arguments infringed Mr. Winn's Sixth and Fourteenth Amendment right to counsel by burdening the exercise of that right. Accordingly, his convictions must be reversed and the case remanded for a new trial. *Toth, supra*.

III. THE TRIAL COURT VIOLATED MR. WINN'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONTATION BY RESTRICTING CROSS-EXAMINATION OF H.D.A. ON MATTERS AFFECTING CREDIBILITY AND BIAS.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *E.S., at 702*.

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).

A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wash.2d 842, 858, 204 P.3d 217 (2009). This includes reliance on unsupported facts, application of the wrong legal standard, or basing a ruling on an erroneous view of the law. *State v. Hudson*, 150 Wash.App. 646, 652, 208 P.3d 1236 (2009). A failure to exercise discretion is itself an abuse of discretion. *State v. Grayson*, 154 Wash.2d 333, 342, 111 P.3d 1183 (2005).

B. The Sixth and Fourteenth Amendment guarantee an accused person the right to confront adverse witnesses, particularly on matters pertaining to credibility and bias.

An accused person has a constitutional right to confront her or his accuser. U.S. Const. Amend VI; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 22. The primary and most crucial aspect of confrontation is the right to conduct meaningful cross-examination of adverse witnesses. *State v. Foster*, 135 Wash.2d 441, 455-56, 957 P.2d

712 (1998); *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). The purpose of cross-examination

...is to test the perception, memory, and credibility of witnesses. Confrontation therefore helps assure the accuracy of the fact-finding process. Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question. As such, the right to confront must be zealously guarded.

State v. Darden, 145 Wash.2d 612, 620, 41 P.3d 1189 (2002) (citations omitted).

Where credibility is at issue, the defense must have wide latitude.

State v. York, 28 Wash.App. 33, 621 P.2d 784 (1980). The only limitations on the right to confront adverse witnesses are (1) that the evidence sought must be relevant and (2) that the right to admit the evidence “must be balanced against the State’s interest in precluding evidence so prejudicial as to disrupt the fairness of the trial.” *Darden*, at 621.

The threshold to admit relevant evidence is low, and even minimally relevant evidence is admissible unless the state can show a compelling interest to exclude prejudicial or inflammatory evidence. *Darden*, at 621; see also ER 401, ER 402. Where evidence is highly probative, no state interest can be compelling enough to preclude its introduction. *State v. Jones*, 168 Wash.2d 713, 721, 230 P.3d 576 (2010) (citing *State v. Hudlow*, 99 Wash.2d 1, 16, 659 P.2d 514 (1983)).

- C. The trial judge erroneously prohibited cross-examination designed to impeach H.A. with specific instances of misconduct relevant to her credibility.

ER 608 permits cross-examination of a witness regarding specific instances of misconduct, if probative of the witness's truthfulness. ER 608(b). Even under an abuse of discretion standard, failure to allow such inquiry is error where the witness is crucial and the misconduct constitutes the only available impeachment. *State v. McSorley*, 128 Wash.App. 598, 612, 116 P.3d 431 (2005) (citing *State v. Clark*, 143 Wash.2d 731, 24 P.3d 1006, cert. denied, 534 U.S. 1000, 122 S.Ct. 475, 151 L.Ed.2d 389 (2001)).

Evidence of theft committed by a witness is admissible under ER 608(b), even if the witness was not charged. *See United States v. Manske*, 186 F.3d 770, 776 (7th Cir. 1999) (listing cases). This is so because “[p]rior acts of theft or receipt of stolen property are, like acts of fraud or deceit, probative of a witness’s truthfulness or untruthfulness under Rule 608(b).” *United States v. Smith*, 80 F.3d 1188, 1193 (C.A.7 (Ill.), 1996) (citing *Varhol v. National R.R. Passenger Corp.*, 909 F.2d 1557 (7th Cir.1990) (en banc)).

In this case, Mr. Winn wished to cross-examine H.A. regarding uncharged thefts. RP (6/17/11) 41-77. Under the *de novo* standard of review required for rulings that directly implicate the values protected by

the confrontation clause, the trial judge erred by refusing to allow the inquiry. *Martin*, at 727. H.A. was the primary witness against Mr. Winn, her credibility was a central issue at trial, evidence that she'd committed theft was relevant to undermine her credibility, and the prosecution cannot show a compelling interest in favor of exclusion. *See York, supra; Darden*, at 621; *Jones*, at 721.

Even under the abuse of discretion standard applied to rulings that don't directly implicate confrontation clause values, the trial court erred. The trial court's basis for excluding the evidence was that H.A. had not been convicted of theft. RP (6/17/11) 75. But ER 608(b) deals with prior misconduct; not convictions. In other words, the trial judge applied the wrong legal standard, and failed to properly exercise discretion. *See Hudson*, at 652; *Grayson*, at 342. Furthermore, given H.A.'s centrality to the prosecution's case and the lack of other meaningful impeachment evidence,⁶ exclusion of the evidence would have been an abuse of discretion even under the correct legal standard. *Jones*, at 721; *McSorley*, at 612.

⁶ Absent permission to explore H.A.'s prior thefts, the only credibility attack defense counsel engaged in was weak impeachment by contradiction, which centered on H.A.'s description of Mr. Winn's penis. RP (6/20/11) 171-219, 225-232.

The refusal to allow Mr. Winn to cross-examine H.A. regarding her prior acts of theft was error. *Id.* The convictions must be reversed, and the case remanded for a new trial. *Id.*

D. The trial judge erroneously restricted cross-examination designed to elicit H.A.'s bias.

An accused person “has a constitutional right to impeach a prosecution witness with bias evidence.” *State v. Spencer*, 111 Wash.App. 401, 408, 45 P.3d 209 (2002). Cross-examination designed to elicit witness bias directly implicates the Sixth Amendment. *Martin*, at 727. Evidence demonstrating witness bias is relevant and admissible, even if it would not be admitted as past conduct to show veracity under ER 608. *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). In *Abel*, the Supreme Court upheld the admission of evidence that a defense witness was in the same prison gang as the defendant. *Id.* The Court found the evidence admissible to show bias, even though it might not be admissible to impeach veracity under ER 608(b). *Id.*, at 55-56.

An accused person must be allowed to cross-examine a witness regarding any expectation that her testimony might affect the resolution of unrelated charges (or possible charges) involving the witness. *Martin*, at 727-730; see also *United States v. Sarracino*, 340 F.3d 1148, 1167 (10th

Cir. 2003) (Refusal to allow cross-examination violates the confrontation clause when “the impeachment material concern[s] possible, not pending, criminal charges.”)

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); *see also Davis v. Alaska*, at 319-320 (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) (possible reinstatement of dismissed charges relevant to bias).

A witness with such expectations may have “a desire to curry favorable treatment” in connection with the uncharged crimes. *Martin*, at 727.⁷ The absence of an explicit agreement “does not end the matter;” nor does the fact that an accused has been “permitted to examine other matters relating to [the witness’s] alleged bias.” *Martin*, at 728-730.

⁷ In *Martin*, for example, a witness was implicated in a murder investigation unrelated to the crime with which the defendant had been charged. The Seventh Circuit held that refusal to allow cross-examination about the murder investigation infringed the defendant’s confrontation right. The court concluded that the error was harmless, because the witness did not provide significant information in the prosecution of the case.

In this case, the uncharged thefts and drug dealing established bias of this sort. By accusing Mr. Winn of sexual misconduct, H.A. successfully diverted attention away from her own criminal misconduct; this gave her an interest in maintaining her allegations against him.⁸ H.A. may have believed that the government would be interested in prosecuting her for the thefts and drug dealing if she changed her story and exonerated Mr. Winn in her testimony.

The erroneous exclusion of evidence establishing bias violated Mr. Winn's constitutional right to confront H.A. *Spencer*, at 408; *Martin*, at 727. Accordingly, the convictions must be reversed and the case remanded for a new trial, with instructions to allow cross-examination into H.A.'s prior uncharged misconduct. *Id.*

CONCLUSION

For the foregoing reasons, Mr. Winn's convictions must be reversed, the illegally recorded conversation suppressed, and the case remanded for a new trial.

⁸ Examples of this sort of bias abound in criminal cases. *See, e.g., Sledge v. Alaska*, 763 P.2d 1364, 1368 (1988) (dependent child had motive to fabricate allegations of sexual assault to divert attention away from her own misconduct); *North Carolina v. Smallwood*, 337 S.E.2d 143, 144 (1985) ("cross examination evidence tended to show that the State's witnesses made up the robbery story to divert attention from their association with prostitution, drugs, and other crime.")

Respectfully submitted this 25th day of February, 2012.

BACKLUND AND MISTRY

A handwritten signature in cursive script, appearing to read "Jodi R. Backlund".

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, Second Corrected Copy, 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 Opening Brief, Second Corrected Copy, 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 February 25, 2012.



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