NO. 30694-1-III
Consolidated with No. 30698-4

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH EPPERSON,

Appellant.

FILED
AUG 03, 2012
Court of Appeals
Division III
State of Washington

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable Ruth E. Reukauf, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied his constitutional right to present a defense.

Issue Pertaining to Assignment of Error

In defense of the state's burglary charge, appellant testified he never entered the home with intent to commit a crime. Instead, he and friends saw the victims' door ajar and entered to make sure the couple (whom appellant and his friends previously knew) was alright. Appellant sought to introduce evidence the couple's house had been the continued target of criminal activity by others. The defense contended this evidence made more probable the fact that the victims' house had already been burglarized when appellant arrived. However, the trial court did not allow appellant to present this evidence. Was appellant denied his constitutional right to present a defense?

B. STATEMENT OF THE CASE

1. Procedural History

On February 2, 2011, the Yakima County prosecutor charged appellant Joseph Epperson with one count of residential burglary. CP 59. On December 2, 2011, the charge was amended to first degree burglary. CP 62. A trial was conducted and the jury

found appellant guilty as charged.[1] CP 80. Epperson was sentenced to 90 months of incarceration. CP 83-90. This appeal follows. RP 81-82.

2. Substantive Facts

At approximately 8:00 p.m. on January 29, 2011, Mary Kelly-Wilton (Mary) and David Wilton (David) left their residence in Yakima to go shopping at Wal-Mart. RP 217, 223.[2] They returned at approximately 11:00 p.m. to find a van parked in their driveway. RP 223-24. They recognized the van as belonging to their friend John Zuvela, Sr. and, thus, "thought nothing of it."[3] RP 225, 344. Upon closer look, however, it appeared to David that the front door was open, so he assumed the house was being burglarized. RP 344-45, 364. David blocked the van with his car, got out, and

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[1] Epperson was tried with co-defendants John Zuvela, Sr. and John Zuvela, Jr. After a half-time motion, the case against Zuvela, Jr. was dismissed. Zuvela, Sr. was convicted as charged.

[2] Unless otherwise noted, the RPs refer to the continuously-paginated, multi-volume trial transcript beginning with January 3, 2012.

[3] The Wiltons knew Zuvela, Sr. for several years. He had worked for them and rented a shed on their property for several months. RP 218-19, 338-39. Zuvela, Sr. was not living there at the time of the incident, however. RP 219. The Wiltons also knew Zuvela, Jr. and Epperson prior to the incident. RP 220, 341. Mary had considered Epperson to be a nice person. RP 220.

began charging at the house yelling at Zuvela, Sr. who was at the door. RP 345, 347. Meanwhile, Mary went to the gas station across the street and asked someone to call 911. RP 227.

At trial, the Wiltons testified that the van side-door was open and their property (including a Rug Doctor and vacuuming equipment) was in the yard or van. RP 224, 227, 352. They claimed Zuvela, Sr. pushed David into some bushes as Zuvela, Sr. made his way from the house to the van and attempted to leave by nudging the Wiltons' car out of the way with his van. RP 228, 233-34, 373-74. According to the Wiltons, David attempted to pull their belongings out of the open van door.[4] RP 232, 352-53. Eventually, Zuvela, Sr. was able to get his van out of the driveway and pull away. RP 354.

Meanwhile, according to the Wiltons, a woman named Regina Rogers (a former care-giver to Mary) appeared at the door carrying two bags that were later found to contain Mary's jewelry. RP 221, 231, 239. After putting the bags back in the house,

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[4] David testified that Zuvela, Jr. was in the van the whole time and did not respond to his father's command to shut the door. Thus, Zuvela Jr. enabled David to recover some items. RP 347-48, 360-61.

Rogers left by walking across the yard and down the street. RP 350. Eventually, Zuvela, Sr. picked her up in the van. RP 354.

As for Epperson, the Wiltons reported Epperson was in the house when they arrived. RP 233, 345. When Epperson came out of the house, David asked Epperson what he was doing there. RP 403. Epperson answered: "I don't know what I am doing here." RP 403. Epperson then left by walking across the yard and was eventually picked up by Zuvela, Sr. down the road. RP 235. The Wiltons said they did not see Epperson with anything in hand, and he never assaulted David. RP 233, 325, 404.

For the first time at trial, however, David claimed that when he was pushed off the porch, he saw through a window Epperson inside the house dismantling Mary's computer. RP 347, 403, 406-07. On cross-examination, David claimed there were no blinds on the window through which he looked, but defense counsel showed police photos that proved otherwise. RP 409.

Epperson testified that on the night of the incident he, Rogers, and the Zuvelas were driving by the Wiltons on their way to Jack in the Box. RP 428-30. They noticed the Wiltons' door was ajar. RP 428-30. They saw the door had been kicked in. RP 354, 431. They decided to check on the Wiltons to make sure they were

okay. RP 430. Upon looking inside, they saw the house had been ransacked. RP 432. At that time, the Wiltons arrived and David came running up to the house angrily screaming and accusing them of burglarizing the home. RP 229, 432. Epperson said he tried to explain to David what happened, but David would not listen. RP 434. Epperson testified he did not take anything, nor did he have any knowledge of any items being placed in the van. RP 433, 438.

The defense theory of the case was that Epperson never had any intent to commit a crime when he entered the home – which had already been burglarized – to check on the Wiltons. RP 499. The defense argued the Wiltons made erroneous assumptions and were not forthright about important details. RP 505-06.

To support his defense, Epperson sought to introduce testimony from David establishing that: the Wiltons had recently been robbed at gunpoint in their own home by a masked individual; the Wiltons' home had been the target of criminal stalking; and that a shot was fired through their window with the bullet lodging inside the house. CP 202-04. Defense counsel wished to establish that something about the Wiltons' home made it a desirable target for

criminal activity by persons other than the defendant. The defense could then argue to the jury that this evidence made it more likely that the Wiltons' house had been burglarized prior to Epperson's arrival, supporting his version of events. RP 203-05, 393. The trial excluded the evidence on grounds it was irrelevant and prejudicial. RP 205-06. In the absence of this evidence, the jury convicted Epperson. CP 80.

C. ARGUMENT

EPPERSON WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

The sixth amendment to the United States Constitution and Const. art. 1, § 22 grant criminal defendants the right to present testimony in one's defense. Washington v. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920, 1925, 18 L.Ed.2d 1019 (1967); State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). Accordingly, a defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise inadmissible. State v. Mee Hui Kim, 134 Wn. App. 27, 41, 139 P.3d 354 (2006) (quoting State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992)).

The mere fact an evidentiary rule may reasonably exclude favorable evidence does not necessarily restrict the defendant from presenting a defense. State v. Rafay, __ Wn. App. __, __ P.3d __ (2012), 2012 WL 2226989 (citing United States v. Scheffer, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998)). However, the trial court may exclude irrelevant evidence. State v. Thomas, 150 Wn.2d 821, 857, 83 P.3d 970 (2004). Thus, the primary question here is whether the evidence regarding the other criminal activity directed at the Wiltons' home was relevant to Epperson's defense.

Evidence is relevant where it has "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. In this case, the evidence that the Wiltons' home was the continued target of criminal conduct by others – which included armed robbery in the home, criminal stalking of the Wiltons while at home, and gunshots fired into the home – was probative and material. It had a tendency to make more probable Epperson's testimony that someone else had forcefully entered and burglarized their home. As such, these facts were directly related to his theory of the case.

Moreover, the testimony was not more prejudicial than probative. Evidence causes "unfair prejudice," and thus may be excluded, when it is more likely to arouse an emotional response than a rational decision by the jury. State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000). Likewise, evidence is excluded where it is likely to skew the truth-finding process. State v. Read 100 Wn. App. 776, 782, 998 P.2d 897 (2000). Neither of these situations exists here.

The evidence was not likely to arouse an emotional response that would derail the truth-finding process, as the defense understood it could not ask the jury to infer that the reason the Wiltons were targeted was because they were involved in criminal activity themselves. RP 204. Instead, the defense merely wished to use the evidence to show that the Wilton home was a desirable target for criminal activity perpetrated by others. The defense intended to argue that this evidence supported Epperson's testimony that the Wiltons' home was burglarized by others prior to his arrival. RP 203. Thus, the jury would not be asked to use this

evidence to infer the Wiltons were criminals or bad persons.[5] Instead, the evidence would have been used for the limited purpose of showing that for reasons unknown, the Wiltons' house was the target of criminal actions by others. Consequently, the evidence was not overly prejudicial, and the trial court erred when excluding it.

Under the constitutional harmless error standard, a conviction will be vacated unless it necessarily appears, beyond a reasonable doubt, that the error did not affect the verdict. State v. Monday, 171 Wn.2d 667, 680, 257 P.3d 551 (2011). This standard cannot be met on this record.

On the one hand, the State's case was not airtight. Significantly, it presented no physical evidence connecting Epperson to the burglary. There were no stolen goods recovered. There was no fingerprint evidence showing Epperson broke the door or touched any of the property inside the house. Although David testified he saw Epperson dismantling Mary's computer, this evidence was not particularly strong given the fact David had not mentioned it until trial, and because he had misrepresented the fact

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[5] The trial court excluded David's prior drug conviction for this reason, and the defense therefore was well aware it could not go down that road. RP 204-05; 394.

that there were blinds on the window through which he supposedly saw this. And Mary testified she never saw Epperson with any goods.

On the other hand, Epperson offered a plausible explanation for why he was in the Wiltons' home. This explanation would have been bolstered had the defense been permitted to present the testimony at issue here. If believed, this explanation would have negated an essential element of the crime. Given this record, it cannot be said the error was harmless.

In sum, Epperson sought to introduce testimony that was relevant to his defense and not overly prejudicial. The trial court's exclusion of the evidence violated Epperson's constitutional right to present a defense. Because the error was not harmless, Epperson's conviction must be reversed. See, State v. Maupin, 128 Wn.2d 918, 930, 913 P.2d 808 (1996).

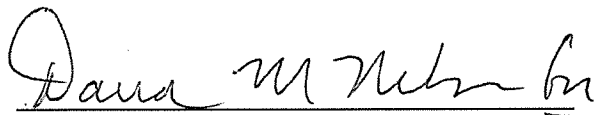
D. CONCLUSION

For the reasons stated above, Epperson respectfully asks this Court to reverse his conviction.

Dated this 3rd day of August, 2012.

Respectfully submitted

NIELSEN, BROMAN & KOCH



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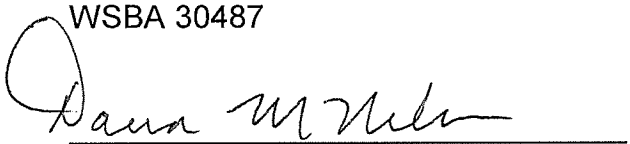

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No. 30694-1-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 3rd day of August, 2012, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 3rd day of August, 2012

X Patrick Mayovsky