

64729-6

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NO. 64729-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

GABRIEL STANLEY,

Appellant.

REC'D
MAY 28 2010
King County Prosecutor
Appellate Unit

28 MAY 2010 PM 4:00

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

The Honorable Gregory P. Mary Roberts, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court violated appellant's Sixth Amendment right to confront the witnesses against him and denied him a fair trial.

Issue Pertaining to Assignment of Error

The Sixth Amendment guarantees defendants the right to cross-examine witnesses with evidence of any motive to be less than truthful. In Davis v. Alaska,¹ the United States Supreme Court held that this right includes the opportunity to reveal that a key witness is on probation and therefore has a motive to deny his own participation and incriminate the defendant. Appellant was denied this very right. Is he entitled to a new trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged Gabriel Stanley and Fulton Johnson with Robbery in the Second Degree. CP 1-6. Jurors acquitted Johnson but convicted Stanley. CP 25; 2RP² 90-91.

¹ Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

² This brief refers to the verbatim report of proceedings as follows: 1RP – November 17-18, 2009; 2RP – November 19-20, 2009; 3RP – December 18, 2009.

The court imposed a standard range sentence of 12 months and a day in prison, and Stanley timely filed his Notice of Appeal. CP 28, 30, 36-46.

2. Evidence of the Robbery

Although Stanley and Johnson were co-defendants, Johnson was a key witness in the prosecution's attempt to convict Stanley. Johnson professed his own innocence and pointed to Stanley as the true culprit. 1RP 25-27.

The trial court denied a motion under ER 609 to impeach Johnson with prior convictions for attempted residential burglary and vehicle prowling. 1RP 22-25. Following that ruling, Stanley's attorney argued:

if Mr. Johnson does testify, some of his statements to the police officers went extensively into the idea that he is on community custody, supervised by DOC, why would he do this, he knows better than to do this. And I would just like to be clear that we can cross-examine him in regard to that while not necessarily mentioning the convictions for which he is on community custody.

1RP 25. Counsel continued:

Mr. Johnson repeatedly talked about how I wouldn't do this, he's on DOC, that wouldn't make any sense, he's being watched, he checks in with his DOC officer. My

position is that because Mr. Johnson is on DOC, and there are implications for him in addition to simply being charged with a crime, that there are implications as far as punishment goes for DOC-type purposes, that it gives him a motive to lie about his participation or lack of participation, in trying to point the finger at Mr. Stanley. And I think that because he raised all of that, for him to simply get up now and say, oh, yes, Mr. Stanley did everything, I did nothing, and me not to be able to cross-examine him in regard to his motives for lying about his participation certainly prejudices Mr. Stanley. I do think it is relevant and should be permitted on cross-examination.

1RP 27.

The deputy prosecuting attorney agreed:

I would join in that motion, Your Honor. I do think it weighs heavily in his bias, particularly with the statements he made and the number of times that he mentioned that why would he do this, he is on DOC, he doesn't need this heat, and things of that nature.

1RP 26. The prosecutor also noted that Johnson was in the process of trying to obtain permission from DOC to go out of state. 1RP 28.

Counsel for Johnson objected, arguing this evidence fell under the court's ER 609 ruling. 1RP 26, 28. The court agreed and prohibited Stanley or the State from using the fact Johnson was on probation to impeach him unless Johnson said something that opened the door. 1RP 29.

The testimony at trial revealed the following. On the evening of July 31, 2009, Andrew Mueller had dinner at the Bison Creek Pizzeria in Burien, about a block and a half from his home. 1RP 50. With his pizza, Mueller had two beers and a shot of Jagermeister. 1RP 51. Before heading home, he stopped at Ronnie's Market and purchased a six-pack of beer. 1RP 51-52. He then headed down an alley toward his apartment building. 1RP 52; exhibit 1.

Once in the alley, two black males approached Mueller. 1RP 54. At trial, Mueller identified Stanley and Johnson as the two men. According to Mueller, Stanley was wearing "a maroonish jumpsuit" with long sleeves and white stripes down the sleeves and pants. Johnson was wearing a black hoody, white tee shirt, and black pants. 1RP 54-55, 80.

Mueller testified that while one of the men stood back about ten to twelve feet and paced back and forth, the other man walked up to him and asked him what he was doing. He replied that he was headed home. 1RP 56-57. The man asked where he lived and Mueller refused to tell him. 1RP 57. The man then asked for money

and Mueller said he did not have any. 1RP 57-58. At that point, the man demanded Mueller's wallet and the second man approached, saying something to the effect of "motherfucker, this is real." 1RP 58-59.

Mueller began to run, but was pushed into a wall and punched in the face two times before falling to the ground. 1RP 60-61, 87. One of the men grabbed Mueller's beer or it fell during the scuffle, and his keys and his wallet were removed from his pocket. 1RP 62-63, 97. Both men then ran away. 1RP 65. Mueller walked back to Ronnie's Market and had the store clerk call 911. 1RP 66, 132.

The police dispatcher indicated the suspects were possibly wearing red and blue clothing. 1RP 123. Officers arrived quickly. 1RP 66. They noted that Mueller had been drinking and documented his injuries. 1RP 75; 2RP 13; exhibits 2-7. Mueller admitted he was "a little intoxicated." 1RP 80.

Meanwhile, an officer spotted two black males in the vicinity of the robbery. 1RP 66, 102. The two suspects split up and one, later identified as Johnson, was located standing at a bus stop. 1RP 102. Johnson led officers to some bushes, where they found two shirts – a Sonics basketball jersey and white tee shirt. 1RP 103, 108-110.

Both had blood on them. 1RP 128. After speaking with Johnson, police went to Stanley's apartment, which was nearby Ronnie's Market, and detained him. 2RP 5-6; exhibit 11. Mueller was driven past both men and positively identified them as the men in the alley. 1RP 66-69; 2RP 13-18.

Police photographed Johnson and Stanley, including their hands to document any injuries. 1RP 116-119; exhibits 15-19. By the time of the photo, Stanley was wearing a red and blue shirt. Exhibit 18. Johnson was wearing a black shirt and jeans. Exhibit 19; 1RP 125. A surveillance photo taken the evening of July 31, 2009, shows Stanley entering Ronnie's Market before the robbery wearing a sleeveless Seattle Sonics jersey. Exhibit 20; 1RP 134, 137-138; 2RP 77.

Two officers testified that Stanley appeared to have redness, swelling or bruising on his knuckles. 1RP 118-119; 2RP 21. This is not apparent, however, from photos of his hands. See exhibits 16-17. And there is no evidence that Stanley's hands looked any different before the robbery. 2RP 50.

In his statement to police, Mueller was very clear in identifying Johnson as the instigator and the man who punched him. He was positive. 1RP 82-85, 90; 2RP 24-25. At trial, however, he identified Stanley as the instigator and the man who punched him and Johnson as the man who took a less active role. 1RP 56-65. Mueller explained that he must have been confused right after the crime. He posited that he might have just agreed with the officer's suggestion that Johnson was the instigator to "get over with the night," did not read the statement carefully, and may have been affected by the alcohol. 1RP 84-85, 90, 96.

As predicted, Johnson took the stand in his own defense and blamed Stanley for everything. He testified that he and Stanley are friends. 2RP 32. He was standing by Ronnie's Market with Stanley, waiting for a ride, when Stanley noticed Mueller across the street and approached him. Once Stanley had crossed the street, he motioned to Johnson to follow, which he did. 2RP 32-33.

Johnson testified that he stood back as Stanley and Mueller talked. He heard Mueller offer Stanley a beer and then Stanley attacked Mueller by wrapping his arm around Mueller's neck. 2RP

34, 44. According to Johnson, he tried to convince Stanley to stop, but the two men continued to fight. 2RP 34-35. Johnson watched as Stanley took Mueller's wallet. 2RP 47-48. Johnson then walked away and Stanley followed. 2RP 35.

Johnson testified that Stanley was wearing a Sonics shirt and had a white tee shirt sticking out of his back pocket. 2RP 35. He stuffed both shirts and a wallet in a bush. 2RP 36. The two men split up, and Johnson walked to the bus stop, where he was arrested. 2RP 36, 53-54. He then showed officers where they could find the shirts and wallet. 2RP 37. Johnson denied any involvement in the robbery. 2RP 37.

In closing argument, the State argued that Johnson and Stanley acted in concert in robbing Mueller and asked jurors to convict both. 2RP 64-68, 83-85. The State theorized that Johnson had worn the white tee shirt found in the bushes and Stanley had worn the green Sonics jersey found at the same location. 2RP 68.

Counsel for Stanley focused on the fact Mueller had identified Johnson as the instigator shortly after the robbery and argued that Stanley was the second man, the one who stood back and whose involvement was unclear. 2RP 76-77, 79. Counsel also focused on the fact Stanley was wearing a Sonics jersey, which Mueller never mentioned in describing his attacker. In fact, the jersey was nothing like the maroon jumpsuit Mueller described. 2RP 77.

Counsel for Johnson argued that Johnson had told the truth, jurors should not discount Johnson's testimony simply because he faced a criminal charge, and Stanley was the only one who committed robbery. 2RP 80-83.

Stanley now appeals to this Court.

C. ARGUMENT

STANLEY WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONT A KEY WITNESS AGAINST HIM.

The Sixth Amendment to the United States Constitution guarantees that in all criminal cases, the accused shall have the right "to be confronted with the witnesses against him." Key to this right is the opportunity for cross-examination. State v. Monson, 113 Wn.2d 833, 840, 784 P.2d 485 (1989). "The law allows cross examination of a witness into matters that will affect credibility by showing bias, ill

will, interest, or corruption.” State v. Russell, 125 Wn.2d 24, 92, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

Johnson was a key witness against Stanley and Stanley wished to cross-examine him to show bias – that he was motivated to downplay his own involvement and blame Stanley to avoid revocation of his probation. The denial of this opportunity bears a remarkable resemblance to the denial in the seminal case on this subject – Davis v. Alaska.

In Davis, the defendant faced charges of grand larceny and burglary. A key prosecution witness was on probation, and defense counsel sought to elicit this fact and argue the witness was acting out of fear his probation might be revoked if he did not deny his own involvement and incriminate Davis. Davis, 415 U.S. at 310-311. The trial court barred any reference to the witness’ probationary status and Davis was convicted. Id. at 311-314.

The United States Supreme Court held this was a violation of Davis’ confrontation rights and reversed his conviction. “We have recognized that the exposure of a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.” Davis, 415 U.S. at 316-317. “The partiality of a witness is subject to exploration at trial, and is ‘always relevant as

discrediting the witness and affecting the weight of his testimony.”
Id. at 316 (quoting 3A J. Wigmore, Evidence sec. 940, p. 775
(Chadbourn rev. 1970)).

In the present case, both counsel for Stanley and the deputy prosecutor recognized the admissibility and importance of Johnson’s probation. He had a clear reason to lie about his role in the crime and blame Stanley. If he committed robbery, he faced a probation revocation and denial of his request to leave the state. 1RP 26-28. There is no doubt that by precluding use of this evidence, the trial court violated Stanley’s Sixth Amendment right to confront a critical witness against him.

The only question remaining is whether that violation can be deemed harmless:

Any error in excluding such evidence is presumed prejudicial but is subject to harmless error analysis: reversal is required unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place.

State v. Spencer, 111 Wn. App. 401, 408, 45 P.3d 209 (2002) (citing State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998)), review denied, 148 Wn.2d 1009 (2003).

Had jurors learned of Johnson’s strong motive to lie, Stanley’s conviction was far from certain.

First, Mueller admitted he was under the influence of alcohol when attacked, and it is apparent he is not clear which man attacked him. Initially, he confidently selected Johnson as that man, but later testified it was Stanley. Yet, he described his attacker as wearing a maroon jumpsuit and never mentioned anything about a Sonics jersey. Consequently, Johnson was a critical witness.

Second, the involvement of the second individual – the one who did not instigate the crime and did not hit Mueller – was far from clear. It was so unclear, jurors acquitted Johnson when they believed he was that individual. Had jurors learned of Johnson's motive to lie, they would have been more likely to find that Stanley was the second individual and that Mueller's initial identification of Johnson as the instigator was correct. This would have made Stanley's conviction far less likely.

Third, without this impeachment evidence, counsel for Johnson was able to argue that jurors should not question Johnson's credibility solely because he had been charged with a crime, since that would be inconsistent with the presumption of innocence. 2RP 81-82. Had jurors learned of Johnson's probationary status, they would have had an additional and unquestionably valid reason to reject his self-serving version of events.

In sum, both counsel for Stanley and the deputy prosecuting attorney recognized the importance of impeaching Johnson with his probationary status; the prosecutor properly noted that it “weigh[ed] heavily in his bias.” 1RP 26. Johnson was a key witness in the case. And the State cannot show, as it must, that the violation of Stanley’s right to confront Johnson with this evidence was harmless beyond a reasonable doubt.

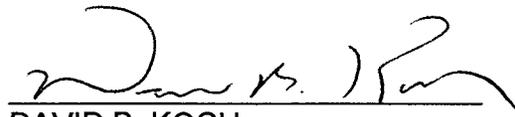
D. CONCLUSION

This Court should reverse Stanley’s conviction and remand for a new and fair trial.

DATED this 27th day of May, 2010.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
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Respondent,)	
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v.)	COA NO. 64729-6-1
)	
GABRIEL STANLEY,)	
)	
Appellant.)	

DECLARATION OF SERVICE

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 28TH DAY OF MAY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] GABRIEL STANELY
15409 9TH AVENUE S. #3
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SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF MAY, 2010.

x *Patrick Mayovsky*