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NO. 65536-1-I

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

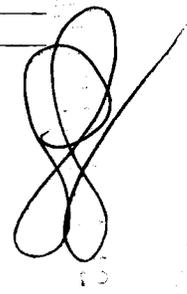
STATE OF WASHINGTON,

Respondent,

v.

ANJUM NAWAZ KHAN,

Appellant.



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

The Honorable Helen Halpert, Judge

REPLY BRIEF OF APPELLANT

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A. RESTATEMENT OF THE CASE

Respondent tellingly omits a number of undisputed facts relevant to the credibility of the complaining witness, K.D. Respondent omits that K.D. originated contact with Mr. Khan on December 14, 2008, by sending him a text message. 3RP 147-148, 150. Some days earlier, she had commented, "you are so gorgeous," on his MySpace page. 3RP 53-55; 5RP 32. Once K.D. arrived at Mr. Khan's apartment and before going into the bedroom to watch the movie, K.D. and Mr. Khan talked about pornography and K.D. said that she liked it. 3RP 75, 155-159. Further, K.D. testified at trial that it did not bother her when Mr. Khan "rubbed her butt" outside her pants. 3RP 176.

Respondent omits that K.D.'s trial testimony -- that 20 seconds after Mr. Khan said he was going to sleep, and before she had time to get off the bed, he was on top of her -- was undermined by her earlier statements to the police and special assault nurse. 3RP 91-98. K.D. told both the police and Nicole Albery the evening of the incident that Mr. Khan was asleep for about five minutes, which would have given her ample time to have gotten up from the

bed and left the apartment. 3RP 173-174. Moreover, K.D.'s testimony that Mr. Khan ejaculated inside her, 3RP 98-101, was not confirmed by the physical evidence. No spermatazoa were found in the vaginal or oral swabs taken at the hospital; one sperm was found in the perineal wash and 40 sperms in the anal swab. 4RP 26-25. The "P-30" test for the presence of semen was positive for the vaginal swab, but some females produce positive P-30 results so the test was not conclusive. 4RP 29.

Respondent also omits that K.D.'s version of events was presented repeatedly to the jury throughout the trial through the testimony of a number of other witnesses, who had no first-hand knowledge of what happened, under the excited utterance, hue and cry, res geste and statements of medical diagnosis exceptions to the hearsay rules. 2RP 43, 106-111, 5RP 7-9, 25. See Opening Brief of Appellant (AOB) 9-10.

Respondent also omits that Mr. Khan explained that by the time he and K.D. had gone into the bedroom to watch a movie, they had already been kissing on the couch in the living room and had viewed some pornography on K.D.'s iPhone. 5RP 37-38.

He recalled that when he put his hand down her shirt while they were kissing on the bed, she said "No. Not right now," and he stopped and soon fell asleep. 5RP 39. He woke to her rubbing his chest and leg. 5RP 40. He began kissing her and she touched his penis with her hand. 5RP 40-41. At some point, she turned to her side with her back to him and he rubbed his penis against her buttocks until he ejaculated. 5RP 40-42.

B. ARGUMENT IN REPLY

1. OPINION EVIDENCE AS TO GUILT FROM THE SEXUAL ASSAULT NURSE DENIED MR. KHAN A CONSTITUTIONALLY FAIR TRIAL.

The relevant testimony of Nichole Albery, the nurse who examined K.D., was about: (1) any injuries that were observed during the examination or absence of injuries, (2) the results from the analysis of the swabs taken during the examination, and (3) any statements or observations of demeanor relevant to a medical diagnosis.

Contrary to the argument of Respondent, the extended detail about what information is given before an examination of a complaining witness was not relevant and, when Ms. Albery referred to and explained that the crime victim's compensation fund

pays for such examinations, it was certainly not necessary for the prosecutor to inquire further if that was so that a person would not be "paying out-of-pocket medical expenses . . . because you happen to be a *victim of a crime*." 2RP 148 (emphasis added); Brief of Respondent (BOR) at 9-11. Contrary to the argument of Respondent, this was not a way of clarifying for the jury that K.D. would not "obtain a monetary benefit" as a result of going to the hospital. BOR 14. Ms. Albery had been specific about what the "compensation" meant: "And what that means is that the emergency room visit is automatically covered, the screening exam -- the medical screening exam here, as well as my portion of the exam, the actual evidence collection."¹ 2RP 148. The questioning about the crime victim compensation fund was nothing more or less than a way of eliciting for the jurors Ms. Albery's opinion and the prosecutor's opinion that K.D. was a victim of a sexual assault: "anyone in the State of Washington *who is a victim of a crime* is entitled to

¹ In fact, RCW 7.68.170 provides that the fund will pay for "gathering evidence for *possible* prosecution." It is not clear that compensation requires any determination that the person examined is a victim.

apply for these benefits." 2RP 147-149 (emphasis added). Similarly, the discussion of why a person can say "stop" at any point during the examination - - to avoid re-traumatization -- was nothing more than a way of getting before the jury, once again, the opinion of Ms. Albery that K.D. had been traumatized as a result of a sexual assault.²

This testimony was not merely general background information; it was opinion testimony that K.D. had been sexually assaulted by Mr. Khan, as she said that she had been. If Ms. Albery had not believed K.D.'s version of events -- which she was permitted to repeat to the jury -- she would have had no reason to testify about victims not being charged for the sexual assault examination or about not wanting to retraumatize K.D.

Here, Ms. Albery was an expert medical witness, specializing in sexual assault examinations and the

² Respondent argued that it "was important to elicit that the examination was invasive and that a person being examined has the ability to stop the examination at any point," so the prosecutor could support an argument that the exam was "terrible," and that K.D. could have backed out at any time, but didn't. This overlooks that Ms. Albery testified that the exam was traumatic because of the sexual assault that occasioned it. 2RP 149. There was no evidence that the examination was worse than examinations adult women routinely undergo.

criminal charge was sexual assault. Ms. Albery's opinion testimony directly expressed her belief in K.D.'s account; K.D.'s exam and story were the only ones calling for her testimony. See, BOR 15 (citing State v. Warren, 134 Wn. App. 44, 55, 138 P.3d 1081 (2006), aff'd on other grounds, 165 Wn.2d 17 (2008)). Although Mr. Khan denied having sexual intercourse, the defense theory was also that K.D. consented to the sexual activity took place. 5RP 40-42. Nurse Albery's testimony indicating that K.D. was a crime victim and had been traumatized, was, contrary to Respondent's argument (p. 13) inconsistent with this defense.

The physical evidence supported Mr. Khan's version of events more than K.D.'s. Credibility was the central issue for the jury. Under the test set out in State v. Montgomery, 163 Wn.2d 577, 591, 183 P.2d 267 (2008), the testimony was impermissible opinion testimony as to guilt and not harmless. As such, the issue is properly raised for the first time on appeal and should result in the reversal of Mr. Khan's convictions.

2. EVIDENCE THAT A PROSECUTOR AND JUDGE HAD ALREADY DETERMINED GUILT DENIED MR. KHAN HIS CONSTITUTIONAL RIGHT TO A TRIAL BEFORE A FAIR AND IMPARTIAL JURY.

The purpose of the prosecutor's questions about the search warrant process was to put before the jury testimony that before a search warrant is issued -- as it had been for Mr. Khan's apartment -- the evidence the police had gathered to establish the elements of a crime and where it took place is reviewed by the prosecutor and a judge. 2RP 75-76. The warrant is reviewed and, impliedly, if found sufficient, permission is granted to execute the warrant, including authority to break and enter. 2RP 75-76.

Contrary to the argument of Respondent, BOR 21, this is precisely the type of testimony found to be improper in State v. Stith, 71 Wn. App. 14, 856 P.2d 415 (1993), testimony implying that the case would not be in court if the police had not acted properly and the judge had not found appropriate grounds to believe that crime had been committed.

Respondent also tries to distinguish this case from United States v. Cunningham, 462 F.3d 708 (7th Cir. 2006), and United States v. Brooks, 508 F.3d 1205 (9th Cir. 2007), by arguing that the problem

with the testimony in Cunningham was that the testimony "permitted the jury to infer that the defendant was engaged in illegal activity *before* the wiretap." BOR at 22. This is no distinction. In this case, the testimony allowed the jury to infer that the defendant was engaged in illegal activity before the search warrant -- the very illegal activity with which he was charged.

Further, the attempt to undercut Cunningham, by reference to the earlier case of United States v. Buchanan, 529 F.2d 1148 (9th Cir. 1975), is similarly unpersuasive. In Buchanan, the issue was whether mere testimony that a search warrant had been obtained was improper vouching. Buchanan at 1156-1157. Here, the testimony went far beyond testimony that a warrant had been issued. Here, the testimony was elicited that specifically described a process in which the police evidence establishing the elements of a crime and the location of where the crime had been committed was reviewed by the prosecution and judge and, on the basis of that submission, permission to search for evidence of that crime had been granted. As in Cunningham and Brooks, the testimony "permitted the jury to infer

that the defendant was engaged in illegal activity," which was the crime charged.

The error, as held in Cunningham, Brooks and State v. Woodward, 21 Ariz. App. 133, 516 P.2d 589 (1973), is in conveying that a judge has already reviewed the case and found sufficient evidence of guilt and inferentially that there may be more evidence which the judge heard than was presented at trial.

Finally, the error was such that nothing short of a new trial could obviate the prejudice of the testimony. It was not "a passing comment," that "conveyed no information about the judge's opinion of the evidence." BOR 25. It was a deliberately-elicited description of the search warrant process: "You have mentioned the term of art, a warrant or search warrant a couple of times. Lieutenant, tell us just as a general matter, what is a search warrant, and what authority does a search warrant give you, and from whom do you get that authority?" 2RP 75. This question was followed by the further question, "And this permission slip, if you will, from a judge to go to a particular location, you need that obviously before you go to the location

to search it." 2RP 76. The testimony was such that jurors would not be able to disregard the implication that a judge had found sufficient evidence of a crime committed at Mr. Khan's apartment to justify breaking in the door if necessary to obtain that evidence.

The error was constitutional error and not harmless beyond a reasonable doubt. Mr. Khan's conviction should be reversed and his case remanded for retrial.

3. EVIDENCE THAT MR. KHAN WAS BOOKED INTO JAIL DENIED HIM HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO THE PRESUMPTION OF INNOCENCE.

The trial prosecutor asked lead Detective Jerry Johnson: "And did you obtain *for purposes of booking*, if you will, of the defendant, did you obtain his name -- full name and date of birth?" 4RP 165 (emphasis added). Respondent now argues that the work "booking" does not refer to incarceration and, therefore, did not deprive Mr. Khan of the presumption of innocence. BOR 28-30. In fact, booking is associated with incarceration and being the first step in the process of being placed in custody-- in the same way that showing the

jury a "mug shot" is associated with jail and criminality.

This testimony, again not relevant to any issue at trial and unfairly prejudicial to Mr. Khan, was deliberately injected into the trial. As stated elsewhere, given the importance of credibility to the jury's determination, this evidence was constitutional error and not harmless in itself or, certainly, when considered with the other trial errors.

4. THE PROSECUTOR COMMITTED MISCONDUCT IN ELICITING OPINION EVIDENCE AS TO GUILT, EVIDENCE THAT A PROSECUTOR AND JUDGE HAD ALREADY DETERMINED GUILT AND THAT MR. KHAN HAD BEEN BOOKED INTO JAIL.

The prosecution was allowed to call and examine witness after witness who had no knowledge of the case except what K.D. had told them. Mr. Khan testified on his own behalf and the physical evidence was more corroborative of his testimony than hers. Deliberately eliciting opinion evidence as to guilt, testimony that probably a prosecutor and certainly a judge had found sufficient evidence that a crime had been committed in Mr. Khan's apartment to issue a search warrant, and eliciting that Mr. Khan was booked were misconduct and

deprived Mr. Khan of a fair trial. See ABO 26-27. The prosecutor elicited the improper testimony from expert witnesses -- the sexual assault nurse and the investigating detectives. While the state now argues that the testimony was just general information or mere passing commentary, that characterization does not describe the overwhelmingly and unfairly prejudicial impact of having these expert witnesses vouch for K.D. and associate Mr. Khan with criminality and incarceration. The testimony in each instance was not relevant to any issue at trial and the prosecutor's misconduct in presenting it to the jury should require granting Mr. Khan a new trial.

5. **THE TRIAL COURT SHOULD HAVE GRANTED THE MOTION FOR NEW TRIAL BECAUSE MR. KHAN WAS DENIED HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO THE EFFECTIVE ASSISTANCE OF COUNSEL AND TO CALL WITNESSES AND PRESENT A DEFENSE.**

Prior to trial, counsel for Mr. Khan agreed with the prosecution's representation that the defense could not inquire into K.D.'s past or present sexual behavior or elicit testimony about her promiscuity unless the state opened the door to such testimony. 1RP 7. At the close of the

testimony, defense counsel indicated that he "would love to have gotten a picture of her" at "a club and partying at the same club where he [Mr. Khan] was" but that the defense was not allowed to present this evidence "because it wasn't relevant." 5RP 111-112. Defense counsel was wrong in making these concessions.

In State v. Jones, 168 Wn.2d 713, 719, 722, 230 P.3d 576 (2010), the Washington Supreme Court clarified (1) that the rape shield statute "applies only to past sexual behavior" not present sexual behavior; and (2) that in any event, "the right to confront and cross-examine witnesses . . . guaranteed by both the federal and state constitutions" is such that "[e]ven if the rape shield statute did apply, it cannot be used to bar evidence of high probative value per the Sixth Amendment." (citing State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002), and Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)).

As Mr. Khan set out in his motion for arrest of judgment or new trial, his trial counsel improperly conceded that the rape shield statute excluded

present as well as past sexual behavior and that exclusion of the MySpace messages denied Mr. Khan his state and federal constitutional rights to call witnesses and present a defense.

The Myspace messages, contrary to the arguments of Respondent, BOR 34-35, were material and admissible evidence of present sexual behavior relevant to the circumstances surrounding the incident. These messages established the K.D. knew Mr. Khan worked at Club Vertigo and that she shared with him that she had "hung out" with a mutual friend and ended up in bed with him. What was important was not whether K.D. had in fact slept with their friend Granger, (see BOR 34), but that she chose to report this sexual event to Mr. Khan as information she wanted him to have. This evidence supported Mr. Khan's defense that whatever occurred between him and K.D. was consensual. The pictures taken shortly after the alleged incident at the Club Vertigo in which K.D. was obviously having a good time also supported the defense theory and responded to the many witnesses reporting how distressed she

was about what happened.³ These pictures were certainly more relevant than the pictures of Mr. Khan introduced to show him looking like a "player," 5RP 111-1121, which the prosecutor relied on in closing to argue that Mr. Khan was not credible while K.D. was. 6RP 8, 10.

This evidence also specifically contradicted K.D.'s testimony on a number of points. (AOB at 29-30). Important elements of her story were that Mr. Khan contacted her first (3RP 60), that she had been in a relationship with a mutual friend and was still romantically interested in him (3RP 58), that she did not know that Mr. Khan worked at Club Vertigo (3RP 154-157) and that she was devastated by the incident (3RP 101, 114). In fact, the MySpace messages rebutted this picture K.D. tried to paint of what occurred. Credibility was central to the jury's determination. Mr. Khan had a state and

³ Respondent asserts that "KD's visit to a club weeks after the rape was irrelevant to the rape allegation and thus inadmissible for reasons unrelated to the rape shield law." BOR 34. Respondent, however, does not articulate why the visit shortly after the alleged incident at the place where she knew Mr. Khan worked was irrelevant or inadmissible.

federal constitutional right to introduce evidence to support his theory of the case and to rebut the case presented against him by the state.

6. CUMULATIVE ERROR DENIED MR. KHAN A FAIR TRIAL.

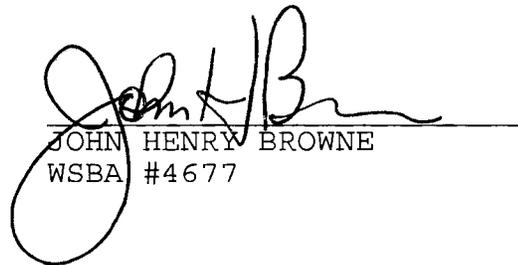
As set out in the Opening Brief of Appellant, the cumulative impact of the errors in this case denied Mr. Khan a fair trial. The errors combined to give the impression that a sexual assault expert, the prosecutor's office and a judge believed Mr. Khan was guilty and to associate him with jail -- at the same time that he was denied the right to fully cross examine and confront the witnesses against him. The case was a credibility case with the physical evidence more consistent with Mr. Khan's testimony than K.D.'s. Cumulative error, as well as the errors individually, should require that he be granted a new trial.

E. CONCLUSION

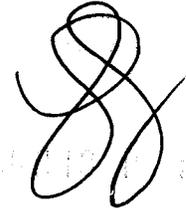
Appellant respectfully submits that his conviction should be reversed and remanded for retrial.

DATED this 13 day of January, 2011.

Respectfully submitted,



JOHN HENRY BROWNE
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2007 12 18 12

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON

Plaintiff,

v.

ANJUM NAWAZ KHAN,

Defendant.

No. 65536-I

DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day, I sent a copy of the “Reply Brief of Appellant” to:

Julie Kays
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///

DECLARATION OF SERVICE - 1

DATED at Seattle, Washington, this 13th day of January, 2011.

A handwritten signature in black ink, appearing to read "Lorie J. Hutt", written in a cursive style.

Lorie J. Hutt

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