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MAR 22 2012

King County Prosecutor  
Appellate Unit  
NO. 67667-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

CURTIS L. HAMILTON,

Appellant.

FILED  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Michael C. Hayden, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court erred by ruling that Curtis L. Hamilton opened the door to admission of his prior felony convictions.

Issue Pertaining to Assignment of Error

During direct examination at his trial for violating a no-contact order obtained by his ex-wife, Hamilton testified he ordered a friend to move out of his ex-wife's house because he was concerned about drug use and drug dealing at the house, where his children also lived. Hamilton also testified he falsely said during a recorded jail telephone conversation that he lived with his ex-wife to avoid a then-pending first degree burglary charge and a possible 19-year sentence.<sup>1</sup> He expounded on these subjects during cross examination. Did the trial court abuse its discretion by finding Hamilton put his character at issue and opened the door to admission of each of his nine felony convictions the court had previously excluded?

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<sup>1</sup> The trial court later granted the State's motion to dismiss the burglary charge. CP 11.

B. STATEMENT OF THE CASE

1. Trial and sentencing

Curtis Hamilton and Amber Hamilton (Amber) were divorced in 2007 after having three children together. 5RP 30, 35, 52.<sup>2</sup> The children lived with Amber in a Woodinville home, while Hamilton lived with his sister in Monroe. 5RP 37, 41-42, 57, 92-94.<sup>3</sup>

In November 2010, there was a valid court order in effect prohibiting Hamilton from contacting Amber. 5RP 28-29. At that time the Hamiltons also had an open case with Child Protective Services (CPS) involving their children. 5RP 30-31. CPS also prohibited Hamilton from being present at the Woodinville home. 5RP 36-37.

Amber's friend, Dena Carter, was staying at Amber's home during this time. 4RP 10, 14-15. Carter had convictions for theft and forgery. 4RP 37. One night, Carter was awakened by an angry Hamilton, who was calling Amber derogatory names. 4RP 17-18. Amber ran to the bathroom and locked herself in. Carter saw Hamilton approach the bathroom, then heard a hitting or kicking sound on the door. 4RP 19-22.

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<sup>2</sup> Hamilton cites to the verbatim report of proceedings as follows: 1RP – 7/20/2011; 2RP – 7/21/2011; 3RP – 7/25/2011; 4RP – 7/26/2011; 5RP – 7/27/2011; 6RP – 9/2/2011.

<sup>3</sup> Amber did not testify at Hamilton's trial.

When Carter observed damage to the door frame, she told Hamilton to leave and that he did not belong there. An argument ensued, during which time Hamilton hit Carter in the mouth with his forearm and threw a water glass that hit her finger. 4RP 23-24. Hamilton then left. 4RP 27. Carter and Amber closed and locked the door to the house and Carter called 911. 4RP 30.

Two police officers responded and took statements from Carter and Amber. 4RP 65-71, 91-95. The officers described Carter as angry and Amber as hesitant and somewhat uncooperative. 4RP 72-73, 95-96. Carter told each officer that Hamilton essentially appeared out of nowhere at the house. 4RP 36-37, 48, 52-54, 76, 99-100.

As the result of Carter's report, the State charged Hamilton with first degree burglary and two counts of violating a domestic violence no-contact order. CP 1-2.

Carter later disclosed she lied about Hamilton's sudden arrival at Amber's house. She said Hamilton was actually living at the house during that time. 4RP 57, 62-63, 144-45. In addition to lying about Hamilton's presence at Amber's home, Carter lied about hypodermic needles found among her belongings in Amber's garage. She initially said she had the needles because she was a diabetic, and only later admitted she in fact

used the needles to inject methamphetamine. 4RP 44, 58-61; 5RP 31-32, 37-39.

Just before trial, the State dismissed the burglary charge and filed an amended information, adding a fourth degree assault charge for allegedly striking Carter to the two counts of violating a no-contact order. CP 11-15; 1RP 8-9.<sup>4</sup>

During its case-in-chief at the resulting trial, the State played a recording of a jail telephone conversation in which Hamilton said he was living at Amber's house at the time of the bathroom door incident. 4RP 111-12, 118-20; 5RP 64-66. Hamilton testified he did not really live with Amber, but said he did because he knew jail calls were recorded and the prosecutor would listen to them. 5RP 69-71. After doing some legal research, Hamilton determined he would be better off being found guilty of violating the no-contact order than first degree burglary, which was pending when he made the call. 5RP 33, 70-76. Therefore, to avoid or influence the burglary accusation, Hamilton said he lived at Amber's house. 5RP 66, 71, 105-06.

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<sup>4</sup> The trial court later granted prosecutor's motion to dismiss one of the two counts of violating the no-contact order. CP 37; 5RP 4-11.

Hamilton denied being at Amber's home during the bathroom door incident. 5RP 34, 70. He asserted Carter called 911 as revenge because he had ordered her to move out of Amber's home after he heard she was using and selling methamphetamine at the house. 5RP 31-32, 67-69, 104. In a different recorded jail call played to the jury, Hamilton said as parent of the children, Amber should have confronted Carter about her drug use. But because she did not, he stepped in and addressed the matter. 5RP 104.

The jury also heard a third recorded jail call, this time between Hamilton and Amber's mother. Hamilton directed Amber's mother to tell Amber's sister, Erin, that he needed her as an alibi witness because he was going to claim he was with Erin at the time of the incident. 5RP 54-55, 101, 118.

The jury ultimately found Hamilton guilty of violating a no-contact order and not guilty of assaulting Carter. CP 63-64. Because of Hamilton's offender score, the trial court imposed a statutory maximum 60-month sentence. CP 65-72.

2. Opening the door

Before trial, the prosecutor announced his intent to offer Hamilton's second degree robbery conviction, but not a conviction for third degree theft, as impeachment evidence under ER 609. 2RP 21-22,

73. Because it was an element of the crime of violating a no-contact order, the parties stipulated that at the time of the charged crime, Hamilton had at least two prior convictions for violating the provisions of a valid no-contact order obtained by Amber, and that Hamilton knew about the order. CP 24-25, 35; 2RP 65-70; 5RP 28-29.

During his trial testimony, Hamilton frequently gave unnecessarily long and/or nonresponsive answers. See e.g., 5RP 30-32, 33-34 (direct examination); 5P 45, 51-52, 56-57, 64-67, 71-72, 74-75 (cross examination). Defense counsel asked Hamilton what he recalled about November 2010. Hamilton responded that there was an open CPS case regarding his children at the time, that anyone who wanted to be around the children at Amber's house was subject to a background check, that Carter was "hanging out at the house," that he had heard "they're doing meth at the pad[,] and that Carter was selling drugs from the house. 5RP 31.

Defense counsel also asked Hamilton to explain the telephone statement that he lived with Amber. 5RP 32. Hamilton answered: "That was stupid on my part. I was desperate. I was terrified of possibly doing 19 years, which is equivalent to second degree murder charge. . . . Based on lies." 5RP 33.

The trial court interjected as follows:

Hold on just a second. The jury is not concerned, should not be concerned with any punishment that may follow conviction. There is an order that the length of incarceration from any crime is not to be mentioned.<sup>5</sup> You will disregard it.

5RP 33. Hamilton apologized for his answer. 2RP 33.

During cross examination, the prosecutor asked Hamilton what he meant by his statement that he was living at Amber's home. 5RP 64.

Hamilton again explained he feared the then-pending first degree burglary charge:

As I said before, that was a mistake on my part. I was scared to death about you trying to give me 200 something months based on all the lies, and you knew they were lies and yet you still - -you're still trying to put me in prison, and you know this woman [Carter] lied five times before she even took the stand, and you still put her on the stand against me. You want me to go to prison that bad, you're going to put a girl on the stand that lied to three police officers, 911 call, an investigator in an interview; you know she perjured herself all those times, yet you still want to put her on the stand. And the reason why she told that lie, because she didn't want my kids to get taken away, yet she's doing meth out of the house; she's got needles in the house; they're selling drugs in the presence –

5RP 64-65. When Hamilton sought to continue, the trial court interjected by telling Hamilton he had answered the question. 5RP 65. The court

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<sup>5</sup> In response to a state's motion in limine, the trial court had entered a pretrial order excluding mention of potential punishment except insofar as it would make the jury careful. 2RP 21.

directed Hamilton to "[j]ust answer the questions[,] and to "wait for the question." 5RP 65-66.

A few questions and answers later, the court directed Hamilton to "[h]old on just a second," and to "[s]top. You've answered the question." 5RP 66-67. Hamilton nevertheless continued talking:

I did that because I was scared. I said that because I was scared to death of going to prison. I'm 47 years old. By the time I got out, I'd be almost 70, based on lies. I was desperate. I've never perjured myself in my life. I've never given a false statement. I've never taken the stand before. I never perjured myself. You can't prove that I perjured myself, and I won't perjure myself. I'm not going to lie under oath. I'm not going to sign a statement under perjury and lie. I'm not going to be mad at someone enough to take away their life and put them in prison because I'm in the wrong and I'm not that guy.

What's happening to me right now is she's so mad at me for throwing her out, even the police testified that her demeanor she was angry, not emotionally disturbed, not crying, I mean she was mad. I told her to get out of the pad.

5RP 67.

Along the same lines, Hamilton later said:

That's why I said what I said. I'm telling you the truth, man. You've asked me I don't know how many times about the same thing. You know what, it keeps going back to why. That's why I did it. My bad on my part. I apologize. But hey, man, you guys swear by them phone calls, and I was desperate, and I knew you were going to listen to that phone call. I knew you were going to listen to it. That's why I said, hey, I was living there, man. But I wasn't living there. I would rather face a charge of a no contact order violation than pertaining, you know, for 60 months, but then instead of 200 and something months. Wouldn't you, honestly?

I'm asking you a question now. If you were in my shoes and someone was trying to put you in prison for damn near the rest of your life based on lies –

SRP 71-72.

The prosecutor asked why he faced so much prison time, and Hamilton replied, "[A]ny time first degree burglary is involved in a crime, everything is run consecutive." SRP 72. Defense counsel then objected, claiming the answer was non responsive. Id. The trial court overruled the objection:

It is non responsive, but he is going way beyond the court orders. And he is introducing items that he should well know are not admissible by my orders, and I told him that that can open up other things. So him having opened up a lot of things that were inadmissible, I don't think your objections are well taken.

SRP 72.

The prosecutor eventually asked Hamilton how many "points" he had. SRP 74. Hamilton responded:

I don't know because I'm not an attorney. Like I said, I'm not real sharp on all the laws. All I got is a GED, but that's to my understanding when I was researching the burglary charge, that's all. I didn't have no attorney helping me, you know what I mean. I couldn't get really much help, you know. I only -- you guys already know, I only get out an hour a day out of my room, you already know that, the guy that testified about the jail calls. That don't give you much time to use the phone, shower, and my life is on the line. Hey, I did the best I could for what I had, you know, and to my knowledge the first degree burglary, to my knowledge, I don't know if it's true, but it was good enough to scare me.

SRP 74-75.

After a few more questions designed to elicit testimony about Hamilton's criminal history, defense counsel objected, asserting the questioning was improper. The court agreed, but said Hamilton's improper answers "opened the door to otherwise improper questions." SRP 75-76.

As the prosecutor began to ask Hamilton about his prior convictions, defense counsel objected and the court excused the jury. SRP 76. Hamilton objected to admission of his felony convictions, especially because most were not for crimes of dishonesty. At most, counsel contended, the jury should hearing nothing more than the number of felony convictions. SRP 76-80.

The trial court disagreed. It found that despite its admonitions that penalties upon conviction were not admissible, Hamilton repeatedly testified the State was being unfair and pursuing draconian punishment. SRP 77, 81. The court also found that Hamilton put his character at issue by suggesting he was keeping his family together despite the misdeeds of Amber and Carter. SRP 81. The court ruled that as a result, all of Hamilton's prior felony convictions were admissible as character evidence under ER 404(b). SRP 77, 81-84.

Thereafter, the prosecutor elicited testimony that Hamilton had been convicted twice in 1982 for second degree burglary, escape in 1985, second degree assault and second degree theft in 1993, third degree assault in 1995, felony violation of a no-contact order in 1998, an unnamed felony in California in the early 2000s, eluding a police officer in 2004, and two felony violations of a no-contact order in 2007. 5RP 114-17.

C. ARGUMENT

THE TRIAL COURT ERRED BY RULING HAMILTON OPENED THE DOOR TO ADMISSION OF HIS FELONY CONVICTIONS.

Under the "open-door" rule, where the defendant during direct examination opens the door to a specific subject that is otherwise inadmissible, the State may pursue the subject to clarify or rebut a false impression left by the defendant. State v. Fisher, 165 Wn.2d 727, 750, 202 P.3d 937 (2009); State v. Kendrick, 47 Wn. App. 620, 631, 736 P.2d 1079, review denied, 108 Wn.2d 1024 (1987). The evidence must be relevant to an issue at trial. State v. Stockton, 91 Wn. App. 35, 40, 955 P.2d 805 (1998). As well, the court must weigh the prejudicial effect of the evidence against its probative value. Stockton, 91 Wn. App. at 41. This court reviews a decision to permit evidence under the open-door rule

for abuse of discretion. State v. Bennett, 42 Wn. App. 125, 127, 708 P.2d 1232 (1985), review denied, 105 Wn.2d 1004 (1986).

Application of these rules to Hamilton's case shows the trial court abused its discretion by permitting the State to exceed the scope of the subject matter opened by Hamilton. Hamilton did not create a false impression that required correction or rebuttal. For example, he did not unfairly take advantage of the court's pretrial exclusion of his criminal history to suggest he was a law-abiding citizen. Cf., State v. Gallagher, 112 Wn. App. 601, 610, 51 P.3d 100 (2002) (trial court did not err by permitting State to elicit previously excluded evidence of syringes found in defendant's home during redirect examination after defendant took advantage of exclusion ruling to convey false impression that home lacked items indicating drug-related activities), review denied, 148 Wn.2d 1023 (2003); State v. Shaver, 116 Wn. App. 375, 384-85, 65 P.3d 688 (2003) (trial counsel was ineffective for opening door to admission of Oregon drug conviction by eliciting testimony that defendant had no convictions other than ones for two burglaries and one escape).

Indeed, Hamilton acknowledged his children were the subjects of a CPS case and that he could not have contact with them. More importantly, Hamilton testified, "I'm not claiming to be a saint here. I'm not claiming to

be [sic] I've never been in trouble, but we're talking about here and now."  
5RP 105.

To the extent Hamilton put his character into issue by portraying himself as a concerned and responsible parent, admission of his prior convictions neither clarified nor rebutted this portrayal. It may have been a different matter had the court ruled that Hamilton opened the door to admission of prior convictions or bad acts related to his children or his parenting to rebut his portrayal.

The same is true of Hamilton's portrayal of himself as a straight-shooting truth teller. While the testimony may have opened the door to prior acts of dishonesty, it did not justify unlimited admission of every prior felony conviction. See State v. Bennett, 42 Wn. App. at 127 (trial court did not abuse its discretion because prosecutor's brief cross-examination of Bennett concerning uncharged spankings of child during assault trial "was limited in scope to a clarification of Bennett's direct testimony regarding the same subject.").

Additionally, Hamilton's testimony about his concern for his children served to explain why he ordered Carter to leave Amber's home. This explanation went directly to his defense theory, which was that Carter called the police because of his order to leave. 5RP 67-68.

Similarly, Hamilton's testimony about the State's insistence on pursuing a first degree burglary charge and potential penalties for conviction of that crime was designed to explain why he said he lived with Amber during the recorded jail conversation.

Moreover, the admitted prior conviction evidence did not rebut an impression that the State was unreasonably targeting Hamilton for draconian punishment. Clearly, Hamilton's complaint was that the State was willing to base a serious charge on Carter's lies, not that the potential punishment was unfair. In that regard, Hamilton did not create a false impression because the jury had already heard Carter admit that she lied several times during the months leading up to trial. Hamilton's prior convictions had nothing to do with the State's decision to base the burglary charge on Carter's dubious credibility.

For these reasons, the admission of each of Hamilton's prior felony convictions did not serve the purpose of the open-door rule and the rule did not justify the trial court's ruling. The court therefore abused its discretion.

What remains to be determined is whether the court's error resulted in prejudice. An evidentiary error is not harmless if it is reasonably probable the jury's verdict would have been materially affected had the

error not occurred. State v. Bashaw, 169 Wn.2d 133, 143, 234 P.3d 195 (2010).

"Prior convictions certainly pose a great risk of prejudice." State v. Bache, 146 Wn. App. 897, 906, 193 P.3d 198 (2008) (citing State v. Oster, 147 Wn.2d 141, 148, 52 P.3d 26 (2002)). Such is the case here. Because Amber did not testify, Carter was the only witness who allegedly saw Hamilton at the house in violation of the no-contact order. The trial therefore boiled down to a credibility contest between Carter and Hamilton. Carter admitted lying to police and the defense investigator. Her credibility was questionable. The jury's "not guilty" verdict for the assault charge suggests jurors did not believe Carter's testimony that Hamilton struck her in the mouth with his forearm and threw a drinking glass that hit her hand.

But after hearing Hamilton had been convicted of burglary in 1982 and of various felonies through 2007, including a violation of a no-contact order in 1998, jurors were probably more likely to have found Hamilton lacked credibility as well. Jurors were also more likely to conclude Hamilton was predisposed to commit crimes and not follow court orders. For these reasons, it is reasonably probable the trial court's error in permitting admission of the convictions affected the jury's verdict. The

court's error was thus not harmless, and this Court should reverse Hamilton's conviction.

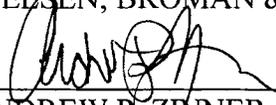
D. CONCLUSION

For the aforesaid reasons, this Court should reverse Hamilton's conviction and remand for a new trial.

DATED this 27 day of March, 2012.

Respectfully submitted,

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State V. Curtis Hamilton

No. 67667-9-I

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Containing a copy of the opening brief, re Curtis Hamilton  
Cause No. 67667-9-I, in the Court of Appeals, Division I, for the state of Washington

I certify under penalty of perjury of the laws of the State of Washington that the  
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