

NO. 68595-3-1

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

STATE OF WASHINGTON,

Respondent,

v.

E.B.,

Appellant.

REC'D
AUG 31 2012
King County Prosecutor
Appellate Unit

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE

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

The Honorable Bruce Hilyer, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENT OF ERROR

Appellant was denied his constitutional right to present a defense when the trial court prohibited defense evidence impeaching the complaining witness's veracity and definitively establishing the factual impossibility of her version of events.

Issue Pertaining to Assignment of Error

Both the state and federal constitutions guarantee every criminal defendant the right to present a defense and challenge the State's evidence and its witnesses. Defendants are given the greatest latitude in two circumstances: (1) where the State's case rests on the credibility of a single witness and (2) in cases involving sex offenses. Both those circumstances are present here, yet the court denied appellant the opportunity to present compelling evidence. Was this a violation of appellant's constitutional rights?

B. STATEMENT OF THE CASE

1. The Rape Allegations

In May 2010, 12-year-old D.I. lived with her family in a Kirkland apartment complex. 1RP¹ 94-96. One of D.I.'s older sisters, K.H., was friends with E.B, who was 15 years old at the

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – March 19, 2012; 2RP – March 20, 2012.

time. 1RP 72, 101; 2RP 83-84. One evening, E.B. and his father had an argument, leaving E.B. without a place to stay for the night. 2RP 85. K.H. had E.B. speak to her parents, who said that E.B. could spend the night at their apartment. 2RP 86.

After everyone else in the home had gone to bed, D.I., K.H., and E.B. sat on a sofa bed in the living room and watched movies. 2RP 87-88; exhibit 6. Around 2:30 or 3:00 a.m., K.H. indicated she was going to bed and asked D.I. if she wanted to join her. D.I. indicated she wanted to stay up and finish the movie, so K.H. left the other two in the living room. 2RP 88-89. The following morning, D.I. did not mention anything to K.H. or anyone else in her family about something happening between her and E.B. and E.B. left later that day. 1RP 111; 2RP 25, 90. To K.H., everything seemed fine. 2RP 102.

Weeks later, however, D.I. claimed that E.B. had touched her inappropriately. 1RP 120; 2RP 25, 90. According to D.I., she shared this information with K.H. when the two were alone in the apartment and, at K.H.'s urging, then shared it with a second older sister. 1RP 112-113, 122. K.H., however, recalled that she and the second sister were in their bedroom talking about private matters and sharing secrets. D.I. entered the room and wanted to

participate, but her sisters told her “no” because D.I. had a tendency to exaggerate and had, in the past, said things to get her sisters in trouble with their parents. 2RP 98, 125-126. D.I. was persistent, however, and after promising to share “a big secret,” was allowed to join in the conversation. 2RP 98-99.

D.I. and K.H. also differed on the content of the initial claim. According to K.H., D.I. simply said that E.B. “had touched her” and put his arm around her, but would not provide any other details. 2RP 90, 96. D.I., however, claimed that she said E.B. put his arm around her, kissed her, and put his finger in her vagina. 1RP 113. In any event, K.H. did not believe D.I. that there had been any physical contact, so D.I. used the “chat” feature on Facebook to strike up a conversation with E.B. while K.H. looked on. 1RP 121; 2RP 90-92. D.I. sent E.B. a message to the effect of “that night was fun” and E.B.’s reply indicated that they had shared a kiss and “it should happen again.” 1RP 121; 2RP 93, 95. When D.I. revealed that K.H. was watching their Facebook interaction, E.B. replied, “Just fuck don’t tell anybody.” 2RP 95.

After this initial chat session, K.H. continued to have contact with E.B. on Facebook. During one conversation, E.B. expressed displeasure that K.H. had discussed the matter with one of E.B.’s

close female friends, and told her not to tell anyone else. Exhibit 10; 2RP 107-110. During a subsequent conversation, K.H. asked E.B. to tell her his version of events. Exhibit 11. E.B. responded that D.I. kissed him and he did not resist. But when D.I. "started to do things that were a little more extreme," he stopped her, which made her angry. Exhibit 11; 2RP 121-124.

At her sisters' urging, D.I. eventually told her parents that E.B. had touched her. 1RP 123-124. She claimed that E.B. touched her vagina, but – as before – did not claim any other type of sexual contact. 1RP 125-126. Her parents contacted police and D.I. was interviewed by Officer Audra Weber on July 16, 2010. 2RP 4. D.I. told Weber she did not think E.B.'s penis ever penetrated her vagina because she did not feel any pain. 2RP 27. Moreover, she made no allegation of oral sex. 2RP 36.

After the interview with police, D.I. spoke to her parents again and this time included several new accusations. For the first time, she claimed there had been intercourse and claimed that she bled afterward. 1RP 126; 2RP 36.

An appointment was made at Harborview, where D.I. was interviewed and examined on July 26, 2010 by Joanne Mettler, an Advanced Registered Nurse Practitioner. 1RP 72-75, 79, 127-128.

D.I. now claimed that her mouth had been on E.B.'s penis and his penis had been in her vagina. 1RP 81-82. She claimed there had been bleeding in the days after and that sometimes it still hurt when she went to the bathroom. 1RP 82. A physical examination revealed no signs of a healed injury, which is not atypical in sexual abuse cases. 1RP 83. Mettler testified it seemed unusual, however, that D.I. would have bled days after the incident. 1RP 82, 84.

On August 3, 2010, D.I. then gave a second interview to police and, on her parents' advice, added the allegations of sexual intercourse (genital and oral) to her previous claims. 1RP 128; 2RP 4, 27. Moreover, D.I. had previously told Detective Weber that E.B. told her to touch his penis but did not show her with his hand where he wanted her to touch him. This time, however, she claimed that E.B. took her hand and showed her where to touch him. 2RP 28-30.

At trial, D.I. testified that after K.H. went to bed, she and E.B. continued to watch a movie together. E.B. put his arm around her and said, "It's kind of like a date." 1RP 104. E.B. then began to talk about younger girls that he had kissed, some as young as thirteen. 1RP 104-105. He also mentioned playing "the nervous

game,” which involves touching another person until that person says stop. The goal is to see how far you can go before the other person stops you. 1RP 105-106.

According to D.I., E.B. told her to sit on his lap, and she straddled him, facing him with one leg on either side of his two legs. 1RP 106. E.B. then kissed her and started touching her, including under her bra, pulled her shorts down, and put his fingers in her vagina. 1RP 106-108. E.B. had his pants unzipped and told D.I. to touch him, which she did. 1RP 108; 2RP 41. He then pushed her head down, indicating he wanted her to put her mouth on his penis, which she did. 1RP 108-109. After D.I. lifted her head back up, E.B. put his penis in her vagina. D.I. complained that it hurt, got up, and said she did not want to do anything else. She then went to her room, where she cried. 1RP 109. D.I. claimed for the first time at trial that as she was going to bed, E.B. said something to the effect of, “If you tell anyone, you know what is going to happen,” which D.I. interpreted to mean they could both get in trouble. 1RP 109-110; 2RP 33-34, 43.

2. D.I. Ties Her Allegations To A Movie Plot

In describing the rape during direct examination, D.I. claimed she had a conversation with E.B. about a movie and that E.B. had

referred to the movie's plot in convincing her to have sexual relations with him:

Prosecutor: Do you remember stating that [E.B.] talked to you about the movie "No Strings Attached"?

D.I.: Yes.

Prosecutor: Do you remember if you had mentioned that previously?

D.I.: The "No Strings Attached" movie? Um, I remember mentioning that in my last interview.

Prosecutor: What is "No Strings Attached"?

D.I.: It's basically a movie where these two – the main plot is these two friends or people are – do stuff, have sex, feel each other up, and they don't tell anyone, and they're not in a relationship, it's just friends with benefits kind of thing.

Prosecutor: And when did that come up?

D.I.: That came up right before he asked me to straddle him.

Prosecutor: I'm sorry, right before what?

D.I.: Right before he asked me to sit on his lap.

Prosecutor: And what was the context?

D.I.: It was just have you ever heard of the movie "No Strings Attached"? I was

like, yes, I have. And he's like, the situation's probably going to turn out similar to that. I was like oh, and then he said sit on my lap.

1RP 130.

On cross-examination, defense counsel probed D.I.'s knowledge of the film:

Defense: And you referenced him mentioning a movie entitled "No Strings Attached"?

....

D.I.: Yes.

Defense: And that's a movie you're familiar with?

D.I.: Yes.

Defense: And mentioning that movie had meaning to me, that it's communicating something to you?

D.I.: Kind of.

....

Defense: So you had seen that movie?

D.I.: I haven't seen it. I have heard about it though.

Defense: Heard about it?

D.I.: I've seen the most recent one.

Defense: What does that mean?

D.I.: There's been different versions of that movie.

Defense: So back in 2010, you were familiar with this movie?

D.I.: Yes.

2RP 37-38.

After the State rested, defense counsel indicated an intent to call investigator Kelly Mandrocina to impeach D.I. and disprove her claim that she and E.B. had discussed the movie "No Strings Attached" immediately preceding the rape. 2RP 127-128. According to defense counsel, the movie D.I. described was not released until 2011, the year *after* the rape allegation, and a prior movie of the same title had a different plot, although she was still in the process of confirming that last fact. 2RP 129-131. The prosecutor objected, indicating that both movies "had the same title, same subject matter" and that the title "indicates what they're about." 2RP 130.

The trial court indicated it had given the defense "ample opportunity to impeach [D.I.] with her own statements" but submitting evidence on the content of the movie would be impeachment on a collateral matter. The court excluded Mandrocina's testimony. 2RP 131-132. Without the ability to call its only witness, the defense rested. 2RP 132.

The court found E.B. guilty of rape of a child in the second degree and imposed a standard range commitment of 15-36 weeks. CP 47-52; Supp. CP ____ (sub no. 63, Order on Disposition); 2RP 152-153. The court included in its trial findings that E.B. asked D.I. "if she had seen the movie *No Strings Attached* and said it could be like that" before instigating physical contact with her. CP 48 (finding 7).

E.B. timely filed his Notice of Appeal. CP 55-62.

C. ARGUMENT

E.B. WAS DENIED HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WHEN THE COURT PROHIBITED THE INTRODUCTION OF SIGNIFICANT DEFENSE EVIDENCE.

The State conceded that the trial court's verdict turned on one critical finding: whether D.I. was credible. 2RP 133 (identifying "the main question" as D.I.'s credibility). And the trial court agreed, stating, "The Court believes that the seminal factual issue is [D.I.]'s credibility." 2RP 152; see also CP 50 (finding 27; "D.I.'s trial testimony was credible."). Thus, any evidence capable of impeaching D.I.'s credibility and contradicting her version of events was of crucial importance to E.B.

The trial court's refusal to allow the defense to demonstrate that the conversation about "No Strings Attached," the supposed immediate prelude to rape, did not and could not have occurred denied E.B. his constitutionally guaranteed right to present a defense. This claim is reviewed de novo. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

The Sixth and Fourteenth Amendments to the United States Constitution,² and article 1, § 21 of the Washington Constitution,³ guarantee a defendant the right to defend against the State's allegations, including the right to present evidence in his defense. This is a fundamental element of due process. Chambers v.

² The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment provides, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

³ Article 1, § 21 provides, "The right of trial by jury shall remain inviolate."

Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976); State v. Austin, 59 Wn. App. 186, 194, 796 P.2d 746 (1990).

Absent a valid justification, excluding relevant defense evidence "deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" Crane v. Kentucky, 476 U.S. 683, 690-691, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986) (quoting United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)). Once defense evidence is shown to be even minimally relevant, the burden shifts to the State to show a compelling interest in excluding it, meaning the evidence would disrupt the fairness of the fact-finding process. If the State cannot do so, the evidence must be admitted. State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002); State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). For evidence with high probative value, it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22. Jones, 168 Wn.2d at 720 (quoting Hudlow, 99 Wn.2d at 16).

The defense evidence in this case was relevant on two related grounds. First, it impeached D.I.'s credibility by showing she had not testified truthfully. Second, it undermined the substance of her testimony, i.e., her claim that she discussed the movie with E.B. just prior to engaging in sexual acts with him. And if that conversation never took place, the court was more likely to discount D.I.'s claims regarding other events at that same time, including the charged acts.

The trial deputy was wrong when he asserted to the trial court that both the 2011 movie "No Strings Attached" and the movie of the same name released years earlier "had the same title, same subject matter" and that the title "indicates what they're about." 2RP 130. Defense counsel was correct. The 2008 film has nothing to do with two people having sexual relations without any commitment. Rather, the plot summary is as follows:

Two apathetic guys with nothing but time on their hands agree to housesit for a friend in a less-than-stellar neighborhood. During their time there, they witness a murder in the backyard and are drawn into a cat and mouse game where they must outwit an assassin and a gang of mob enforcers, and somehow escape unscathed before their friend's family from out of town stops by to visit.

IMDb, <http://www.imdb.com/title/tt1183686/plotsummary>.⁴ Because the 2011 film with this same title had not yet been released as of May 2010,⁵ the conversation D.I. described with E.B. as a prelude to their physical contact simply could not have happened. Therefore, it was critical the defense be permitted to present this evidence.

“The credibility of a witness may be attacked by any party, including the party calling the witness.” ER 607. And evidence offered to impeach a witness is relevant if “(1) it tends to cast doubt on the credibility of the person being impeached, and (2) the credibility of the person being impeached is a fact of consequence to the action.” State v. Allen S., 98 Wn. App. 452, 459-460, 989 P.2d 1222 (1999), review denied sub nom. State v. Swagerty, 140

⁴ This Court can take judicial notice of the plot from the 2008 movie under ER 201, which authorizes judicial notice where the asserted facts are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” IMDb (the Internet Movie Database) is “the world’s most popular and authoritative source for movie, TV and celebrity content.” See www.IMDb.com. This would not be the first case where an appellate court has looked to a movie plot in resolving a legal issue. See State v. Elmore, 155 Wn.2d 758, 772, 123 P.3d 72 (2005) (citing 12 Angry Men (Orion-Nova Productions 1957)).

⁵ The 2011 film was released to the public 8 months *after* the alleged conversation. See IMDb, <http://www.imdb.com/title/tt1411238/>.

Wn.2d 1022, 10 P.3d 405 (2000). Both requirements are satisfied here.

Moreover, the opportunity to challenge a witness's credibility is particularly critical in two circumstances: (1) where a case rests essentially on the trier of fact believing or disbelieving that one witness or (2) where the offense at issue is a sex offense. State v. Smith, 130 Wn.2d 215, 227, 922 P.2d 811 (1996); State v. Whyde, 30 Wn. App. 162, 166, 632 P.2d 913 (1981); State v. Roberts, 25 Wn. App. 830, 834-35, 611 P.2d 1297 (1980). The first circumstance needs no explanation. The reasoning behind the second was discussed in one of this Court's earliest decisions, State v. Peterson, 2 Wn. App. 464, 469 P.2d 980 (1970). For sex crimes, the opportunity to challenge credibility is particularly important because "owing to natural instincts and laudable sentiments on the part of the [trier of fact], the usual circumstances of isolation of the parties involved . . . and the understandable lack of objective corroborative evidence the defendant is often disproportionately at the mercy of the complaining witness' testimony." Peterson, 2 Wn. App. at 466-467.

As the trial judge recognized, the verdict in E.B.'s case turned on whether the court believed D.I.'s allegations. 2RP 152.

Moreover, this case involved a sexual offense. Because of “natural instincts and laudable sentiments,” the isolation of the parties, and the absence of determinative physical evidence, E.B. was “at the mercy of the complaining witness’ testimony.” Peterson, 2 Wn. App. at 467. Therefore, it was particularly critical in this case that E.B. be provided an opportunity to challenge D.I.’s credibility and her version of events.

The court’s ruling that the defense evidence was “collateral” is simply incorrect. The usual test is: “Could the contradicting fact be offered as evidence for any purpose other than mere contradiction of the witness? In other words, would the contradicting fact be considered relevant, substantive evidence if offered as such? If the answer is yes, the evidence is admissible.” 5A K. Tegland, Wash. Prac., Evidence § 607.19, Contradiction of Witness’s Testimony, at 409 (5th ed. 2007).

Here, the evidence went to the heart of the defense case – demonstrating both that D.I. was not credible and that the events of the alleged rape could not have occurred as D.I. contended. In contrast, there was no valid reason, much less a compelling one, to keep this evidence from the jury. Under the Sixth and Fourteenth Amendments to the United States Constitution and article 1, § 21

of the Washington Constitution, E.B. was entitled to present this evidence as part of his trial defense.

Reversal is required unless this Court is “convinced beyond a reasonable doubt that any reasonable [trier of fact] would have reached the same result without the error.” Jones, 168 Wn.2d at 724 (quoting State v. Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002)). Several weeks passed before D.I. made any allegation of rape. D.I. then gave differing accounts of the rape depending on when and to whom she was speaking. There was no physical evidence demonstrating sexual contact, and no witness who could corroborate D.I.’s version of events. In a case where the court’s verdict turned on whether D.I. was believable, the excluded evidence was critical indeed. Because the State cannot show that exclusion of the defense evidence was harmless beyond a reasonable doubt, E.B. must receive a new trial.

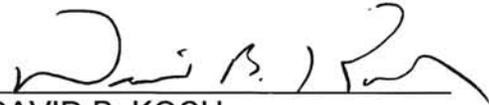
D. CONCLUSION

E.B. was denied his constitutional right to present a defense. His conviction should be reversed and his case remanded for a new trial – one in which the trier of fact considers all relevant defense evidence.

DATED this 31st day of August, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

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

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| STATE OF WASHINGTON |) | |
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| Respondent, |) | |
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| v. |) | COA NO. 68595-3-I |
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| E.B., |) | |
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| 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 31ST 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 DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] E.B.
11636 102ND PLACE NE
KIRKLAND, WA 98034

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF AUGUST 2012.

x Patrick Mayovsky