

69206-2

69206-2

NO. 69206-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MAURICE LEON JORDAN,

Appellant.

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KING COUNTY

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

**BRIEF OF RESPONDENT**

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A. ISSUE PRESENTED

Evidence that a defendant has attempted to influence a witness' testimony is admissible as evidence of consciousness of guilt. Jordan wrote letters to his father from the jail expressing his anger about his father's statements to the police, and his general displeasure about his father's cooperation with the State. Did the trial court act within its discretion by admitting Jordan's letters at trial?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Maurice Leon Jordan, with one count of Assault in the Second Degree and one count of Intimidating a Witness. CP 1-5. Prior to trial, the State amended the information, charging Jordan with one count of Robbery in the Second Degree, one count of Assault in the Fourth Degree, and one count of Intimidating a Witness. CP 438-39. A jury trial was held in July of 2012 before the Honorable Michael Hayden.

At the conclusion of the trial, the jury convicted Jordan of Robbery in the Second Degree and Assault in the Fourth Degree. CP 467-68. The jury found Jordan not guilty of Intimidating a

Witness. CP 469. Prior to sentencing, the State moved to dismiss count two, Assault in the Fourth Degree, based on the concept of merger and/or double jeopardy. 7RP 2.<sup>1</sup> The trial court imposed a standard range sentence. CP 470-78. Jordan now appeals.

## 2. SUBSTANTIVE FACTS

Jordan and Earl Howard have known each other for about 17 or 18 years. 4RP 11. The two men would often work together doing small odd jobs, such as cleaning houses. 4RP 12. They would typically meet at the corner of Lowe's on Rainier Avenue in Seattle. 4RP 12. April 30, 2012, was one of those days, except that instead of looking for work, Jordan and Howard decided to go to Miller Jordan's<sup>2</sup> house for a barbeque. 4RP 13. Miller is Jordan's father, and the two appear to have a difficult relationship.<sup>3</sup> 4RP 11, 124. Nonetheless, the plan was to barbeque at Miller's house. 4RP 15. Howard and Jordan went to the grocery store to

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<sup>1</sup> The Verbatim Report of this Jury Trial consists of six volumes referred to in this brief as: 1RP (July 11, 2012), 2RP (July 12, 2012), 3RP (July 16, 2012), 4RP (July 17, 2012), 5RP (July 18, 2012), 6RP (July 19, 2012) and the sentencing hearing 7RP (July 27, 2012).

<sup>2</sup> Because Miller Jordan and the appellant share the last name, Miller Jordan will be referred by his first name. No disrespect is intended.

<sup>3</sup> The tension in the relationship between Jordan and Miller was apparent throughout the entire trial, especially when Jordan was cross-examining Miller. The trial court cautioned Jordan about his treatment of Miller in front of the jury. 4RP 148-58; 5RP 14-77.

purchase the food. 4RP 15, 62. Jordan and Howard chose what to buy, and Howard paid for the groceries with his food stamps. 4RP 15, 62.

Once they arrived at Miller's house, Miller went inside while Jordan stayed outside starting the grill in the company of Howard. 4RP 127. Miller heard an altercation with four-letter words being used, so he went outside and found Jordan and Howard fighting. 4RP 127. Miller told both men to leave and offered to give Howard \$35 for the food that he had purchased. 4RP 16, 66, 129; 5RP 29, 84. Miller handed Howard the money voluntarily, which made Jordan angry. 6RP 83-84. As a result, Jordan attacked Howard. 4RP 131.

Jordan first hit Howard on the side of his head. 4RP 26, 69. The two men then wrestled and moved to the back of the house. 4RP 18, 26, 68. Jordan knocked Howard to the ground and proceeded to hit him between two and four times on the face. 4RP 18, 27, 31, 68. While Howard was on the ground, Jordan snatched the money out of his right front pocket and ran out of the yard. 4RP 18, 27, 32-33, 72, 133. In Jordan's own words, he was really angry because his father had given money to Howard, and

this anger resulted in a physical fight that ended with Jordan taking the money that belonged to Howard. 6RP 84-85.

During the physical altercation, Miller told Jordan to stop or he would call the police. 4RP 32, 74, 133; 5RP 38, 88. Given that Jordan continued to fight Howard, and Howard had blood running down his face, Miller called 911. 4RP 32; 5RP 38. The medics responded and transported Howard to Harborview Medical Center by ambulance, where he received four stitches as a result of a laceration. 4RP 32-33, 36; 5RP 110, 114-15. While at Harborview, Howard came in contact with Alice Walters, an emergency room social worker. 5RP 162. Howard told Walters that he had been assaulted by a friend over money. 5RP 166. Walters called 911 and Seattle Police Department Officer Steiger responded. 5RP 151. When Officer Steiger arrived, Howard told the officer that he had been robbed and assaulted by his friend Jordan. 5RP 151-52.

The next day, Howard went back to Lowe's, where he had met Jordan the previous day, and saw Jordan around the corner. 4RP 36, 38, 79. He did not want to speak with Jordan so he backed away. 4RP 36. Jordan apparently saw Howard backing away so he called him and said, "This is not over yet." 4RP 36. Jordan called again over the next several days and left two

messages on Howard's phone, which Howard perceived as threats. 4RP 36-37, 40, 86. One of the messages said: "I don't know why you called the police on me; you caused me a lot of grief, now we'll see what happens." 4RP 38.

On May 2, 2012, Seattle Police Department Officer Michelle Vallor was working patrol at the parking lot of Qwest field. 5RP 119-20. While she was in her car, Howard approached her to report another voicemail he had received from Jordan. 4RP 37; 5RP 121-23. Vallor listened to the message and heard: "You better keep your mouth shut and be quiet." 5RP 121-23. Howard identified the person in his voicemail as Jordan. 5RP 125.

While in custody, Jordan wrote three letters to Miller. The first letter was dated January 1, 2012, and was titled "Tragedy." 4RP 138; Ex. 9. The second letter was dated January 16, 2012, and was titled "Deposition Testimony." 4RP 140; Ex. 10. And the last letter was dated January 30, 2012, and was titled "Subpoena." 4RP 141; Ex. 11. Miller provided all three letters to the State. 4RP 137.

C. ARGUMENT

THE LETTERS JORDAN WROTE TO MILLER WERE PROPERLY ADMITTED AS EVIDENCE OF CONSCIOUSNESS OF GUILT.

Jordan claims that the trial court improperly admitted the letters he wrote to his father from jail because the letters were inflammatory and irrelevant. Specifically, Jordan argues the letters were solely indicative of a strained father-son relationship and sprinkled with profanity. Jordan's argument should be rejected because the content of the letters was not about their relationship; rather, the letters were directly related to the pending case. Mainly, Jordan resentfully commented on Miller's statements to the police and his cooperation with the prosecutors. Therefore, the trial court properly exercised its discretion in admitting the letters as evidence of Jordan's consciousness of guilt.

Evidence is relevant if 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. The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Evidence is relevant if a logical nexus exists between the evidence and the fact

to be established. State v. Burkins, 94 Wn. App. 677, 692, 973 P.2d 15 (1999). Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. ER 403.

The trial court has broad discretion in balancing the probative value of evidence against its potential prejudicial impact, and the court's decision to admit relevant evidence will not be reversed absent manifest abuse of that discretion. State v. Collins, 45 Wn. App. 541, 548, 726 P.2d 491 (1986). "An abuse of discretion exists when a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). Thus, this Court's review of the trial court's decision to admit Jordan's letters to Miller is for an abuse of discretion.

Washington courts consistently admit evidence that shows a defendant has attempted to influence a witness' testimony as evidence of consciousness of guilt. It is well settled that evidence of witness tampering is admissible as evidence of consciousness of guilt in the trial of the charge to which the witness' testimony

pertains. State v. Rodriguez, 163 Wn. App. 215, 228, 259 P.3d 1145 (2011); State v. Sanders, 66 Wn. App. 878, 886, 833 P.2d 452 (1992). Likewise, evidence that the defendant, or a person acting on behalf of the defendant, tried to prevent a witness from appearing and testifying at trial is relevant because it is evidence of the defendant's guilt. State v. Kosanke, 23 Wn.2d 211, 215, 160 P.2d 541 (1945); State v. McGhee, 57 Wn. App. 457, 460-61, 788 P.2d 603 (1990) (evidence that a defendant threatened a witness is relevant because it reveals a consciousness of guilt).

Jordan sent letters to Miller ranting about Miller's involvement in the case, but argues that the letters do not support a substantial and real inference of consciousness of guilt because the letters do not contain actual threats. Jordan's argument fails because a threat is not required in order to influence a witness' testimony, and to render the letters admissible. State v. Moran, 119 Wn. App. 197, 218, 81 P.3d 122 (2003). For instance, in Moran, the defendant was charged with premeditated murder in the first degree. Id. at 208. Shortly after Moran's arrest, Jessie Burch, a friend of Moran's girlfriend, made a favorable statement to the police about Moran's demeanor the day after the victim's death. Id. at 217. Later, when defense counsel tried to interview her, Burch

became hostile and said she had changed her mind about Moran. Burch told defense counsel that she did not want to do anything to help Moran because he might be guilty. Id.

As a result, Moran wrote a letter to a friend, David Johnson, asking Johnson to talk to Burch. Id. Moran's letter to Johnson stated in part (with spelling errors): "Jessi is being a bitch. She's telling my attorney that she thinks that I killed Steve now. Can you talk to the bitch. In her statement to the cop's she was behind me all the way now she's being a cunt." Id. at 217-18. The letter was signed "Your homie Jeramie." Id. at 218. The trial court admitted the letter on the ground that it was relevant and probative of Moran's particular position on the case, and to show Moran's propensity to try to influence people so that they would be cooperative and more favorable to him. Id. at 217.

On appeal, Moran argued that the trial court erred by admitting the letter because its minimal probative value was outweighed by the danger of unfair prejudice. Id. at 218. Similar to Jordan's argument, Moran claimed that the letter could not be considered a threat to a witness. Id. Moran also pointed out that the offensive language in the letter and the reference to "homie" raised the image of gang violence. Id.

This Court found that the trial court had acted within its discretion in admitting Moran's letter, holding that: "Although not a threat, Moran's letter to Johnson can be reasonably interpreted as a request that Johnson try to get Burch to change her mind about Moran's guilt and return to her initial favorable statement." Id.

The trial court here, relying on Moran, ruled that as long as there is consciousness of guilt shown by sending abusive or threatening letters to a potential witness the letters are admissible. 1RP 71. Jordan argues the letters are irrelevant because "they do not discuss details of the pending case at all, other than Jordan's characterization of Miller's version of the incident as 'a fucking lie.'" Although Jordan does not go to great lengths to discuss all of the specific details of the events that took place on April 30, 2011, Jordan does address relevant facts of the charge against him, and openly expresses his anger about Miller's cooperation with police. Specifically, in the letter dated January 16, 2012, and titled "Deposition Testimony" Jordan writes:

Also just so you know, I have the right to haul your ass down here to explain to me what just exactly you are going to be testifying to in late March. But I'm not going to do that. But I will send you a certified subpoena just so you know I'm serious. Oh yeah you can refuse but if you do, I'll have your little "buddies" in the prosecutor's office get you down here. Call em

up and ask them. Your [sic] probably on a first name basis.

Since I'm my own counsel I got to look at what you told the police. When they came by the house, and the phone interviews. Yeah, you had a lot to say. Problem is, you don't know shit about what happened! You told the police I took the money out of Mr. Howard's pocket? You seen that huh? You know that's a fucking lie. Why you tell em that. Mr. Howard is telling a different story. So am I. We will see you in court.

But, when you show up, I'm not going to be asking you nothing about the incident that happened April 30, 2011. I just want you to show up and tell the truth.

What I want to know, is why were you giving information to the police, so they could try to kill me!

4RP 146; Ex. 10.

Similarly, in the letter dated January 30, 2012, titled "Subpoena," Jordan writes about Miller appearing in court to testify and the fact that Miller has made statements about the events that led to the charge:

You've been running your mouth about the case since April 30th 2011. You have talked to everyone I know about what (happened) 'you lying piece of shit'. You lying son of a bitch! You can't talk about the case, yeah, right! Fuck you! I'll see you in court!

4RP 147; Ex. 11.

As in Moran, the letters<sup>4</sup> were relevant to show Jordan's attempt to influence Miller. The entire context of the letters was the criminal case, for which Miller was a witness. The letters do not address any other topics whatsoever. Thus, even if the letters did not contain any specific threats, a reasonable inference can be made that the abusive language used in "Deposition Testimony" and "Subpoena" was an attempt to impact Miller's testimony at trial. For instance, by stating "Mr. Howard is telling a different story. So am I," in reference to Miller's statement to the police about Jordan taking the money from Howard's pocket, Jordan was arguably attempting to sway Miller's testimony. And in that same letter, his protest of "what I want to know is why were you giving information to the police, so they could try to kill me!" as well as calling the prosecutor's office "your little 'buddies,'" is a criticism about Miller's cooperation with the State. Likewise, in his letter titled "Subpoena," Jordan's anger at the fact that Miller discussed the events with others is directly relevant to his consciousness of guilt.

In sum, even though Jordan and Miller have had a strained relationship, the letters were not about their relationship, but

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<sup>4</sup> The first letter titled "Tragedy" did not overtly reference the incident or Miller's cooperation with the State. However, the general theme of this letter is mistakes, accidents, and punishment. When read in context, the inferences in this letter are about the incident and the consequences Jordan was facing.

instead about the case. The letters specifically addressed Miller's cooperation with the State. Through his language, Jordan attempted to influence Miller's testimony, and as such, the probative value of this evidence was not outweighed by any prejudice the disrespectful language may have created.

Lastly, Jordan argues that the jury's passions were undoubtedly inflamed by the obviously dysfunctional relationship between him and his father and by the use of profanity in letters to a parent. If Jordan had been prejudiced from the admission of the letters, and the jury would have been inflamed, he would not likely have been acquitted of the Intimidating a Witness charge. Consequently, the letters were relevant, and their probative value was not outweighed by unfair prejudice.

But even if this Court were to conclude that the letters were inadmissible, any possible error is harmless. When the error results from a violation of an evidentiary rule, rather than from a constitutional mandate, the reviewing court does not apply the more stringent "harmless error beyond a reasonable doubt" standard. State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980); State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). Instead, the Court applies the rule that error is not prejudicial unless, within

reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. Tharp, 96 Wn.2d at 599. The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole. Nghiem v. State, 73 Wn. App. 405, 413, 869 P.2d 1086 (1994).

Here, it is undisputed that Jordan assaulted Howard in order to take money from him. Jordan himself admitted at trial that Miller handed the money to Howard voluntarily, which made Jordan angry; and as a result of Jordan's anger a physical fight occurred, injuring Howard; and after the physical altercation, where the only injured party was Howard, Jordan left the yard with money that did not belong to him. 6RP 83-86. The record contains overwhelming evidence that Jordan robbed Howard, not only from the testimony provided by Howard and Miller, but also from Jordan's own testimony. Hence, it is within reasonable probabilities that the outcome of the trial would have been the same without the alleged error.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Jordan's conviction of Robbery in the Second Degree.

DATED this 24<sup>th</sup> day of January, 2014.

Respectfully submitted,

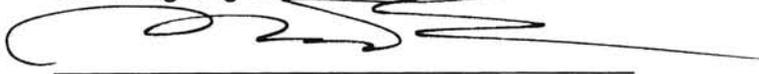
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Sarah M. Hrobsky, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. MAURICE LEON JORDAN, Cause No. 69206-2-1, 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 foregoing is true and correct.



Bora Ly  
Done in Seattle, Washington

Date

01-24-14