

69726-9

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NO. 69726-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

KIER GARDNER,

Appellant.



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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. Mr. Gardner was denied a fair trial when the trial court ruled that evidence impeaching a key police officer's credibility was immaterial and did not need to be disclosed to Mr. Gardner.

Criminal prosecutions “must comport with prevailing notions of fundamental fairness,” and an accused must have a meaningful opportunity to present a complete defense. U.S. Const. amend. XIV; *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984). Accordingly, the government must preserve and disclose to the defense favorable evidence that is material to guilt or punishment, including impeachment evidence. *Trombetta*, 467 U.S. at 480, 485-88; *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *State v. Benn*, 120 Wn.2d 631, 650, 845 P.2d 289 (1993); *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 87 L. Ed.2d 481 (1985). Nondisclosure of evidence affecting the credibility of a key witness prejudices an accused's right to a fair trial and complete defense. *Bagley*, 473 U.S. at 677.

Although the disclosure requirement includes misconduct of an important State witness, the trial court below ruled Mr. Gardner was not entitled to see records showing Sergeant Murphy lied in a prior warrant application, causing that proceeding to be dismissed. *Compare*

Kitsap County Deputy Sheriff's Guild v. Kitsap County, 167 Wn.2d 428, 447-48, 219 P.3d 675 (2009) (Johnson, J. dissenting); *United States v. Bland*, 517 F.3d 930, 934 (7th Cir. 2008); *United States v. Holt*, 486 F.3d 997, 1001 (7th Cir. 2007) *with* RP 4, 5. This ruling was in error. Sergeant Murphy was the alleged victim of the third-degree assault charge and the arresting officer on the misdemeanor assault charge relating to Charitie Wells. The trial court's ruling deprived Mr. Gardner of the opportunity to cross-examine Sergeant Murphy on her prior untruthfulness under oath. *See United States v. Abel*, 469 U.S. 45, 50, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984) (right to cross-examine includes developing capacity for untruthfulness); *Davis v. Alaska*, 415 U.S. 308, 316, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).

The State argues the trial court's ruling should be affirmed because the evidence was "remote" to Sergeant Murphy's bias or prejudice. Resp. Br. at 6, 8. More directly, the undisclosed evidence pertained to Sergeant Murphy's proclivity for untruthfulness, or her lack of credibility. To that point, it is difficult to imagine evidence more persuasive of untruthfulness than a law enforcement officer's direct lie under oath to a court. That was precisely the evidence the trial court shielded from Mr. Gardner.

Even the opportunity to pose a single question to Sergeant Murphy was material given the nature of that question. Law enforcement officers carry an imprimatur of integrity. *E.g.*, *State v. Demery*, 144 Wn.2d 753, 762-63, 30 P.3d 1278 (2001) (“An officer’s live testimony offered during trial, like a prosecutor’s statements made during trial, may often carr[y] an aura of special reliability and trustworthiness.” (internal quotations omitted)); *State v. Carlin*, 40 Wn. App. 698, 703, 700 P.2d 323 (1985) (noting weight of opinion offered by a government official, such as a sheriff or police officer). If Mr. Gardner had received the evidence to ask Sergeant Murphy whether she had previously lied under oath to a court, an affirmative response would have severely damaged her credibility. *Cf. Napue v. Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959) (“jury’s estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence”; “it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant’s life or liberty may depend”).

Mr. Gardner is entitled to a new, fair trial because the suppression of Sergeant Murphy’s prior untruthfulness “undermined confidence in the outcome of the trial.” *Bagley*, 473 U.S. at 678.

2. The trial court also violated Mr. Gardner's constitutional rights by denying a defense instruction, excluding a defense witness, and compelling his testimony to preserve his defense.

As set forth in Mr. Gardner's opening brief, he was further denied the right to a fair trial, to present a defense and not to be compelled as a witness against himself when the trial court denied his proposed instruction on volitional act, precluded him from calling the jail nurse, Connie Magana, as a witness, and required Mr. Gardner to testify before he could argue lack of intent or present evidence related to that defense.

Mr. Gardner's defense was that a prior wound to his head rendered him unable to control his faculties. As a result, he was unaware of his actions and could not act with the volition necessary for assault. *E.g.*, RP 4-5, 10-12, 175, 185-86, 194, 239-41.¹ Trial counsel proposed a jury instruction in support of this lack of volition defense: "The State must prove a certain minimal mental element of volition to establish criminal liability. In other words, a person must be aware of their actions and voluntarily choose to take that action." CP 8; RP 11-

¹ See Concussion-Overview, *WebMD*, <http://www.webmd.com/brain/tc/traumatic-brain-injury-concussion-overview> at 1, 2 (last visited Dec. 2, 2013) (symptoms can include not thinking clearly, not being able to concentrate, convulsions or seizures, loss of balance).

12. In support of his defense, Mr. Gardner also sought to call Connie Magana, a nurse who treated Mr. Gardner in jail. RP 172-73, 182-87. Nurse Magana's testimony would have supported his defense by indicating the prescriptions and treatment provided for Mr. Gardner's extensive head injury, as well as his lack of recollection when he regained consciousness in jail. RP 172-74, 182-84. But the trial court precluded Mr. Gardner from calling Nurse Magana and denied the proposed defense instruction. RP 231, 239-43. The rulings denied Mr. Gardner his right to present a defense. *E.g.*, *State v. Maupin*, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996) (reversing conviction where defendant was precluded from presenting testimony of defense witness); *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987) (“[A]t a minimum . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt.”).²

The court also compromised Mr. Gardner's constitutional rights by compelling his testimony. The State's chronology is inaccurate. *See* Resp. Br. at 19-21. From virtually the outset, the trial court opined

² Contrary to the State's argument in response, Mr. Gardner sufficiently raised the error caused by the denial of the proposed defense instruction. *See* Op. Br. at 1-3, 7-8, 14, 21-26, 29-31; *see also id.* at 31-32 (arguing cumulative effect of errors denied Gardner a fair trial).

that Mr. Gardner would not be able to support his lack of volition defense unless he testified himself or called an expert witness. RP 12-15. The trial court so held even though trial counsel made clear other witnesses would support Mr. Gardner's defense. RP 14-15. The court later ruled that the other evidence in support of his defense—testimony of the officers that took him to the hospital against his will due to the severity of his head injury—was irrelevant unless Mr. Gardner testified himself. RP 179-80. Specifically, the court stated,

As I indicated at side bar, the court is not concerned with the content of his testimony. But for any of this to be relevant, it would require first his taking the stand and testifying. And, again, I don't comment on the substance of his testimony. So that's my ruling.

RP 180. The court explained neither why Mr. Gardner's testimony was necessary to make relevant third-party evidence of his head trauma nor how his testimony could make that third-party evidence relevant regardless of the content of Mr. Gardner's testimony. *See id.* Nonetheless, the court so set the stage for compelling Mr. Gardner's testimony.

The next day, Mr. Gardner unequivocally informed the court he wished to invoke his right not to be a witness against himself. RP 182 (“As far as Mr. Gardner testifying, he wishes to invoke his Fifth

Amendment right and not testify at all.”). Trial counsel continued to argue that Mr. Gardner should be allowed to support the defense through “the witnesses that observed him prior to his arrival at the hospital, people who took him to the hospital and the nurse [Magana] who observed him when he came to the jail after being released from the hospital.” RP 182; *accord* RP 182-84. The court maintained its ruling that without testimony from an expert or from Mr. Gardner himself, the third-party evidence would be “speculation, conjecture or guess” and thus excluded as irrelevant. RP 185-87.

Because the trial court would not let the defense theory in without testimony from an expert or Mr. Gardner and because Mr. Gardner wished to not testify, defense counsel immediately moved for a continuance to secure an expert. RP 188. That request was promptly denied. *Id.* In response to that ruling, trial counsel spoke with his client “for just a moment” and then informed the court “Mr. Gardner would like to testify.” *Id.*

In short, Mr. Gardner testified because he was left with the untenable choice of excluding his defense entirely or testifying in support of it. *Cf. State v. Thomas*, 128 Wn.2d 553, 560, 910 P.2d 475 (1996) (recognizing trial court’s ability to erroneously influence an

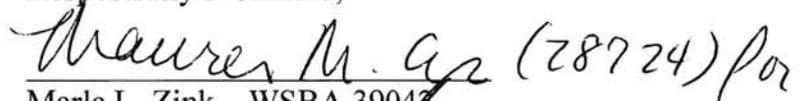
accused's decision to waive constitutional right not to testify). Mr. Gardner had made plain just moments before that he was invoking his constitutional right not to testify. The decision to testify came only after the court required his testimony in order to present his defense. This compulsion violated his constitutional right and requires reversal. *See* U.S. Const. amends. V, XIV; Const. art. I, § 9.³

B. CONCLUSION

For the reasons set forth above and in Mr. Gardner's opening brief, the trial court denied Mr. Gardner a fair trial and violated his constitutional rights. This Court should reverse Mr. Gardner's convictions.

DATED this 2nd day of December, 2013.

Respectfully submitted,


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³ As noted by the State, since the filing of Mr. Gardner's opening brief, our Supreme Court granted review of a similar issue in *State v. Mendes*, No. 88945-7 (oral arg. scheduled for Jan. 14, 2014). The issue whether article I, section 9 provides broader protection than the federal privilege against compelled testimony is also pending before our Supreme Court in *State v. Piatnitsky*, No. 87904-4 (oral arg. heard Jun. 25, 2013) (supplemental briefs available online).

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v.)	NO. 69726-9-I
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KIER GARDNER,)	
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APPELLANT.)	

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