

70204-1

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NO. 70204-1-1

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

STATE OF WASHINGTON,

Respondent,

v.

DANNY BRANDT,

Appellant.

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

The Honorable Sharon Armstrong, Judge

BRIEF OF APPELLANT

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12/1/14

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A. ASSIGNMENT OF ERROR

1. The trial court violated appellant's right to confrontation when it excluded evidence that the state's key identification witness had been convicted of false reporting and giving a false name to the police. RP 63.

2. Because the state cannot show the error is harmless, the trial court erred in entering its judgment and sentence. CP 72-79.

Introduction and Issues Related to Assignments of Error

The state offered testimony from one key witness who claimed she could identify appellant as the person who broke into a bar in Seattle's International District. That witness was known to police by several aliases, and on three occasions she had been convicted for providing false information to the police. The defense sought to impeach the witness, but the trial court excluded this evidence.

1. Did the trial court err when it failed to analyze the probative value of the evidence as compared with any unfair prejudice to the state?

2. Did the trial court err by excluding probative defense evidence without finding the evidence was so prejudicial as to disrupt the fairness of the fact-finding process at trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

On July 25, 2012, the King County prosecutor charged appellant Danny Brandt with one count of second degree burglary. CP 1. Brandt was convicted by a jury on December 3, 2012. CP 52.

On March 25, 2013, a sentencing hearing was held before the Honorable Sean P. O'Donnell. CP 77. The state recommended a 68-month sentence and opposed a Drug Offender Sentencing Alternative (DOSA), arguing the DOSA option had not been successful in the past. RP 421-25. The court imposed a 60-month midrange sentence. CP 73, 75; RP 432-34.

2. Trial Testimony

Joe's Bar and Grill is located at 500 Fifth Avenue South in Seattle. RP 202, 223. Around 5:00 a.m. on February 12, 2012, someone broke into Joe's while it was closed. RP 226.

Louis Walker was in his parked van about one block from Joe's when he saw a person thrusting something between the door and the door jamb at Joe's King Street entrance. RP 285-88. When the door opened, the person went inside for 1-2 minutes, then left through the same door. RP 289. Walker called 911, but he could only describe

the person as a male wearing Carhartt clothes. He was unable to identify Brandt at trial. RP 217, 291-93.

Seattle Police Officer Bruce Godsoe was dispatched to Joe's shortly after the 911 call. RP 202. When he arrived, the door was pried open, the jukebox was open and its interior was damaged. RP 204, 213-14. Video surveillance revealed a long haired male, wearing a work-type jacket and pants, walk through the bar, pry open the jukebox and leave. RP 206-07, 234-35; Ex. 4. Neither he nor any of the employees present identified the person. RP 207, 218. No suspect was identified or located that day. RP 203.

Carmelita Valenzuela was the manager at Joe's. RP 222-23. Valenzuela viewed the video on February 12 and said she recognized the man as her regular customer and told the police. RP 227-28, 259. She also testified that the police were gone by the time she arrived between 8:00 and 9:00 a.m. RP 232. She claimed to recognize the person on the video by his clothes, long hair, facial hair, short stature, and face because she had seen him ten to twenty times. RP 228-29.

Valenzuela did not know the man by name, but she said she knew he worked as a longshoreman, ordered Bud Light, played pull tab number five, and drove a Mustang. RP 229-31, 252-53. But she did not mention any of these details to the police. Nor did she

mention he won pull tab number five and his name could have been in the pull tab records that are required by the gambling commission. RP 255, 260, 270-72, 275, 280-81, 305, 316, 319, 351. Valenzuela said Joe's is broken into so often she did not recall when she made a copy of the video for the police or if she handed it to them. Every time a burglary occurred she made a video and the police came to pick it up. RP 258.

The next day, the case was assigned to Detective John Crumb and he also watched the video. RP 323, 327-28; Ex. 4. He reported the business was dimly lit, all camera views were from overhead, and none provided a clear, identifiable image of the suspect's face. RP 350. Crumb was only able to note the person in the video was a white male with long dark brown hair, a small build, pronounced cheekbones and a sunken-in face, wearing Carhartt clothes. RP 330-31. He also observed a light area around the mouth, but could not tell if it was facial hair. Crumb was unable to identify the suspect. RP 332. At that point the case went inactive. RP 333.

Valenzuela testified she frequently called the police and nothing ever happened. RP 245. She said she saw the man from the video walk past the bar, sometime between February and July, and given her experience with the police her first reaction was to confront

him. RP 241, 244, 276-77. She ran outside and said, "We know that you're the one that broke into the jukebox." She claimed he apologized and responded, "[t]imes are hard[.]" RP 241. She said she told him he was not welcome back at Joe's. RP 242.

In July, Joe's was broken into again and Godsoe was the responding officer. RP 214. During this unrelated investigation Valenzuela told Godsoe she had seen the man and had confronted him on the street. Godsoe shrugged it off, but related the information to Crumb. RP 245, 333. Crumb reopened the investigation, contacted Valenzuela a few days later, and they met at Joe's on July 19. RP 245, 335.

Crumb read her a photo montage admonition, which advised she may or may not see the suspect and, if she did, he could now have different facial hair or body weight. He then laid down one photo at a time, so she could not compare them. RP 338-39. When Valenzuela saw photo number five, she identified him as the person on the video and the person she confronted on the street. Photo number five was Brandt's driver's license photo. Brandt also owns a 2007 Mustang Coupe. RP 246, 339-42, 345-47.

Later that day, Crumb met with Brandt and was able to observe him for about thirty minutes. During that time, he saw that Brandt was

a white male with long dark brown hair and a small build, that his cheeks were sunken in, and that he was about five feet five inches tall. After observing Brandt, Crumb reviewed the surveillance video and believed there were similarities between Brandt and the person in the video. RP 346-48.

3. In Limine Ruling Excluding Valenzuela's Prior Acts of Dishonesty

Prior to trial, the defense sought an in limine ruling allowing the impeachment of Valenzuela with her prior acts of dishonesty, under ER 608(b). CP 27-29, 36. The defense offered evidence that Valenzuela had been convicted three times for giving false information to a police officer: in 1990, 1992 and again in 1994. The state did not contest that Valenzuela's prior acts of dishonesty occurred. RP 61-64.¹

The trial court's initial reaction was that Valenzuela's convictions were "too old" as they were more than ten years old. RP 63. Defense counsel then pointed out that there is no time limit under ER 608 for specific acts of dishonesty. The trial court replied, "I – my ruling would be it's irrelevant due to the passage of time." RP 63.

¹ Counsel for the state noted the first conviction was "[f]rom 1990," RP 62, and defense counsel referred to two others, from 1992 and 1994, for a "[t]otal of three altogether." RP 63.

4. Closing Argument

The prosecutor started her closing argument by paraphrasing what Valenzuela claimed was said during the alleged confrontation with Brandt on the street outside Joe's. RP 365-66.² The state conceded the main trial issue was the burglar's identity, RP 369, then emphasized Valenzuela's testimony on multiple occasions. RP 370-75, 385-87. At one point the prosecutor went so far as to claim Brandt made a "confession" to Valenzuela. CP 374.

Defense counsel argued the video was of low resolution and insufficient to allow a true identification. Valenzuela was the key witness, as she was the only person who claimed the ability to identify Brandt from the video. Counsel also pointed out reasons why Valenzuela's testimony was not credible and why she was not trustworthy. RP 377-85. She could not keep key facts straight. RP 381, 383. She claimed she knew at the time she initially saw the video that the burglar was a customer who drove a Mustang and played the number 5 pull tabs, but she did not tell that to the detective when she gave him the video. RP 379-80, 383.

² The prosecutor began, "I know it was you. I saw you on video. I know you were the one who stole money from the jukebox."

"Times were hard. I'm sorry. I'm sorry." RP 365.

In rebuttal, the state argued that Valenzuela's testimony was truthful. RP 385-89. Counsel went so far as to assert a personal opinion that Valenzuela was truthful, at which time the court sustained the defense objection and struck the prosecutor's opinion. RP 388.

C. ARGUMENT

1. THE EXCLUSION OF PROBATIVE EVIDENCE SHOWING THE STATE'S KEY WITNESS HAD LIED TO POLICE AT LEAST THREE TIMES DENIED BRANDT HIS RIGHTS TO CONFRONTATION AND TO PRESENT A DEFENSE.

A person accused of a criminal offense has the right to confront his accusers. U.S. Const. amend. 6;³ Const. art. 1, § 22;⁴ Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (citing Washington v. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)). This right includes the right to present

³ "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him[.]"

⁴ "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases[.]"

evidence to impeach the state's witnesses. Davis v. Alaska, 415 U.S. 308, 316, 39 L. Ed. 2d 347, 94 S. Ct. 1105, 1110 (1974).

The right to present a defense is a fundamental element of due process. State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010) (citing, *inter alia*, Chambers v. Mississippi, 410 U.S. 284, 294, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973)). The right to present a defense includes the right to present relevant evidence.

“[I]f relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” Darden, 145 Wn.2d at 622. The State's interest in excluding prejudicial evidence must also “be balanced against the defendant's need for the information sought,” and relevant information can be withheld only “if the State's interest outweighs the defendant's need.” Id. We must remember that “the integrity of the truthfinding process and [a] defendant's right to a fair trial” are important considerations. State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). We have therefore noted that for evidence of 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.” Id. at 16.

Jones, 168 Wn.2d at 722. “[T]he more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters.” Darden, 145 Wn.2d at 619 (citing State v. Dickenson, 48 Wn. App. 457, 466, 740 P.2d 312 (1987)).

Appellate courts owe no deference to a trial court when the question involves Sixth Amendment violations, which are reviewed de novo. State v. Jasper, 174 Wn.2d 96, 108, 271 P.3d 876 (2012); Jones, 168 Wn.2d at 719. A trial court's decision to exclude evidence should be reversed where the trial court abuses its discretion. State v. Johnson, 90 Wn. App. 54, 69-71, 950 P.2d 981 (1998).

a. The Court Erred in Excluding the Evidence.

The defense offered Valenzuela's prior acts of dishonesty to impeach her testimony. Under ER 608(b),⁵ specific instances of a witness's conduct may be inquired into on cross-examination for the purpose of impeaching the witness, if the conduct is probative of

⁵ That rule provides:

Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

ER 608(b).

truthfulness or untruthfulness and the cross-examiner has a good faith basis for the inquiry.⁶ Johnson, 90 Wn. App. at 71.

The trial court initially excluded Valenzuela's acts of dishonesty based solely on the fact that more than ten years had passed. But as defense counsel pointed out, ER 608 has no similar time limit to the limit in ER 609. RP 63. A court abuses its discretion when it applies an incorrect legal standard. State v. Berniard, ___ Wn. App. ___, 327 P.3d 1290, 1296 (2014); In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).⁷

After defense counsel's argument alerted the trial court to this error, the court fell back with a terse statement that the evidence of Valenzuela's dishonesty was "irrelevant due to the passage of time." This was little more than the same erroneous application of ER 609(a) limits to an ER 608 question.

⁶ There is no question defense counsel had a good faith basis for the proposed inquiry; the state did not dispute that Valenzuela had provided false information to police, nor that she had been convicted three times for it. RP 62-64. There was no danger that the jury might be confused or distracted by a dispute over that factual question.

⁷ Even under ER 609(b), the 10-year period does not mandate exclusion. A conviction is admissible if "the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." ER 609(b); State v. Russell, 104 Wn. App. 422, 433, 16 P.3d 664 (2001).

To the extent the trial court actually addressed the question of relevance, the court was simply wrong. Conduct involving fraud or deception is indicative of a general disposition regarding truthfulness. Accordingly, this Court has held a witness's prior false statements to authorities are probative of the witness's credibility. In Johnson, this Court stated, "[w]hen a person gives multiple false names to the police, the use of those names indicates an intent to deceive and bears directly on that person's general disposition with regard to truthfulness." Johnson, 90 Wn. App. at 71. In State v. Wilson, 60 Wn. App. 887, 892-93, 808 P.2d 754 (1991), this Court held that a witness's prior false statement on a public assistance form was probative on the witness's credibility. See also, State v. York, 28 Wn. App. 33, 36, 621 P.2d 784 (1980) (in reversing the trial court's exclusion of the witness's prior undercover difficulties in Montana, the court noted "[a]ny fact which goes to the trustworthiness of the witness may be elicited if it is germane to the issue.").

In light of these cases, the probative value of Valenzuela's prior acts of dishonesty is substantial. She lied to the police not once, not twice, but three times, and was convicted each time. It is not just these acts of lying, but their repetition in the face of criminal sanction

that loudly speak to Valenzuela's credibility. This is impeachment evidence of high probative value.

Nor did the court make any effort on the record to analyze the probative value of the impeachment, or to determine if that value was substantially outweighed by unfair prejudice to the state. This too is error. See e.g., State v. Russell, 104 Wn. App. 422, 433-37, 16 P.3d 664 (2001) (trial court errs when it fails to articulate its ER 609(b) balancing analysis on the record); State v. Venegas, 155 Wn. App. 507, 525-26, 228 P.3d 813 (when admitting evidence under ER 404(b), the trial court must balance probative value versus prejudice on the record), rev. denied, 170 Wn.2d 1003 (2010); accord State v. Thach, 126 Wn. App. 297, 310-11, 106 P.3d 782 (2005).

Neither the trial court nor the state identified any unfair prejudice from the evidence. The state certainly did not argue, nor did the court find, that the state met its burden "to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." Jones, 168 Wn.2d at 720 (quoting Darden, 145 Wn.2d at 622). The trial court simply relied on the ten-year period of ER 609(a) to exclude the evidence of Valenzuela's repeated dishonesty.

Valenzuela was the state's key witness, and her testimony provided the weight of the evidence against Brandt.⁸ As the supreme court held in Darden, this is the precise circumstance where the defense must be given more latitude in cross-examination, not less. Darden, 145 Wn.2d at 619. As this Court held in York, "as a matter of fundamental fairness, the defense should have been allowed to bring out the only negative characteristics of the one most important witness against [the accused.]" York, 28 Wn. App. at 37.

By failing to analyze the issue under the correct legal standards, and by failing to reach the correct substantive conclusion, the trial court erred.

b. The Error Is Prejudicial.

When a trial court errs in excluding important defense evidence, or in improperly limiting defense cross examination, the state bears the burden to show the error is harmless beyond a reasonable doubt. Jones, 168 Wn.2d at 724. An error is not harmless unless the state can convince this Court "beyond a reasonable doubt that any reasonable jury would have reached the same result without the error." Id.

⁸ The prosecutor's closing argument will prevent the state from making a contrary claim in this Court.

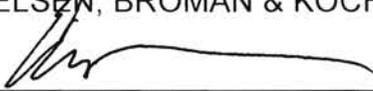
The state cannot meet its burden on this record. The state's highlighted and repeated emphasis in closing argument shows the importance of Valenzuela's testimony. The grainy video from Joe's did not allow any of the state's other witnesses to claim they could identify Brandt, nor was it sufficient to allow the jury to do so. Only Valenzuela arrogated the ability to identify Brandt from the video, and even she failed to provide that information to the police when she initially spoke with Detective Crumb. On top of that, she added her uncorroborated claim that Brandt confessed to her on the street outside Joe's. Where her credibility was the key contested issue in the case, the state cannot show this error is harmless beyond a reasonable doubt. Jones, 168 Wn.2d at 724-25; Darden, 145 Wn.2d at 626; York, 28 Wn. App. at 37.

D. CONCLUSION

This Court should reverse Brandt's conviction and remand for a new trial.

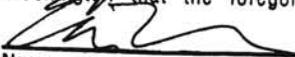
DATED this 19th day of September, 2014.

Respectfully Submitted,
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Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorney of record of respondent, containing a copy of the document to which this declaration is attached.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.


Name _____ Date 9/19/14
Done in Seattle, WA

SEP 19 10 15 AM '14
SUPERIOR COURT
CLERK OF COURT