

70204-1

70204-1

NO. 70204-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

DANNY BRANDT,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SHARON ARMSTRONG

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**BRIEF OF RESPONDENT**

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A. ISSUE PRESENTED

Prohibiting cross-examination of a State's witness is an abuse of discretion if the witness is crucial and the alleged misconduct is the only available impeachment. Here, the trial court precluded impeachment of a witness with misdemeanor convictions that were approximately 20 years old and defense thoroughly explored other available areas of impeachment. Did the court act within its discretion by excluding this evidence?

B. STATEMENT OF FACTS

1. PROCEDURAL FACTS

The State charged the defendant, Danny Brandt, with burglary in the second degree. CP 1. The State alleged that he broke into Joe's Bar and Grill, pried open the jukebox, and stole money from inside. CP 3-6. Brandt was found guilty after a trial by jury.<sup>1</sup> CP 52. The trial court imposed a standard range sentence of 60 months of confinement. CP 72-79. Brandt appealed. CP 80-81.

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<sup>1</sup> Sentencing was delayed until March of 2013, in part because Brandt failed to appear at sentencing in December of 2012. CP 128.

2. SUBSTANTIVE FACTS

a. Facts Of The Crime.

On February 12, 2012, Seattle Police Officer Bruce Godsoe responded to a call reporting a burglary that had happened around 5:00 a.m. at Joe's Bar and Grill in Seattle's International District. 2RP 200-02.<sup>2</sup> Upon arrival, Godsoe found that the door to the south entrance of the bar was broken and the jukebox was damaged from having been pried open. 2RP 204.

Louis Walker had called 911 to report the burglary that morning. 3RP 291. From one block away, he had seen a man approach the door, thrust something at the jamb to force the door open, and go inside for a minute or two. 3RP 287-89, 291. Walker observed that the man was wearing a Carhartt jacket, a light-colored hooded sweatshirt, and dark pants, but Walker did not see his face. 3RP 290-91.

Although a suspect was not located that day, there was surveillance video that showed a man walk through Joe's, pry open the jukebox, take money out of it, and leave the bar. 2RP 207, 228, 239; Ex. 4. Detective John Crumb obtained a copy of the security

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<sup>2</sup> The verbatim report of proceedings consists of three volumes, which will be referred to in this brief as follows: 1RP (11/26/12); 2RP (11/27/12); 3RP (11/28/12, 12/3/12, 3/25/13).

video from Joe's on February 15, 2012. 3RP 328. The video showed a white male with long brown hair sticking out from under a tan stocking cap on his head, standing around 5'6" tall, wearing Carhartt work clothes and tan leather gloves, and with pronounced cheekbones and a thin, sunken face. 3RP 329-31. Because Crumb was unable to identify the suspect at that time, the case became inactive on February 21, 2012. 3RP 333.

Later in the day on February 12, one of the bartenders, Carmelita Valenzuela, recognized the suspect in the surveillance video as a regular customer of the bar. 2RP 227-28. She did not know his name but she had seen him at Joe's on 10-20 occasions and had talked with him at times. 2RP 228-29. She knew a number of details about the suspect, such as his occupation as a longshoreman, that he drank Bud Light, that he always played pull tab game number five, and that he drove a new Mustang. 2RP 229-31. Because the suspect had won more than \$20 playing pull tabs, there likely was a record of his name and date of birth at the bar. 2RP 254-55, 270-71. At the time, Valenzuela did not think to

tell the police the information that she knew about the suspect in the video.<sup>3</sup> 3RP 271-72.

A month or more after the burglary, Valenzuela saw the burglary suspect on the street outside Joe's. 2RP 241. She went outside and confronted him about the burglary. 2RP 241. He responded by apologizing and saying that times were hard. 2RP 241-42. Valenzuela did not call police after her confrontation with the man because she did not think it would matter. 2RP 245. Bar employees called police regularly for problems at Joe's, but they were often not satisfied with the response they received from law enforcement. 2RP 245.

When Officer Godsoe was at the bar to investigate another burglary in July of 2012, Valenzuela told him that she recognized the suspect in the video from the February incident. 2RP 245; 3RP 334-35. She also disclosed to police her interaction with the suspect outside Joe's, but she was unclear if the confrontation had happened one month after the burglary or one month before she spoke with police in July. 3RP 276.

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<sup>3</sup> Valenzuela testified that she told police on February 12 that she recognized the suspect as a customer, but law enforcement had no record of receiving that information until July. 2RP 259; 3RP 351.

Based on information that Crumb had gathered from police resources and other officers, he prepared a photo montage that included Brandt's picture and showed it to Valenzuela. 3RP 335-37. Valenzuela picked Brandt as the person captured on the surveillance video breaking into the bar in February, and who had later apologized for the burglary. 2RP 248; 3RP 341.

As a result, Crumb met with Brandt shortly after Valenzuela picked him in the montage. 3RP 345. Crumb observed that Brandt's appearance differed from his Department of Licensing (DOL) photo, which was taken in October of 2012. 3RP 348; Ex. 7. When Crumb watched the security video again after meeting with Brandt, he noticed the similarities between Brandt and the person on the video. 3RP 348. Crumb also found that Brandt had a 2007 Mustang Coupe registered to him with the DOL. 3RP 345.

b. Facts Relating To Valenzuela's Prior Convictions.

During Valenzuela's testimony at a pre-trial CrR 3.6 hearing regarding the photo montage, defense counsel sought to cross-examine her with prior convictions for crimes of dishonesty. 1RP 61-62. The prosecutor objected based on the age of the convictions. 1RP 61-62. A printout of Valenzuela's criminal history

from the Judicial Information System (JIS) was marked as an exhibit for the court to review. Pretrial Ex. 3. After a recess, the court clarified with defense counsel that the intended impeachment involved convictions for giving false information to an officer from 1992 and 1994.<sup>4</sup> 1RP 63. Defense counsel argued that unlike ER 609, there was no time limit barring admissibility under ER 608. 1RP 63. The trial court excluded this evidence, finding that the information was “very old” and it was irrelevant due to the passage of time. 1RP 63.

When the parties addressed motions in limine after the CrR 3.6 hearing, the State moved to exclude Valenzuela’s prior convictions under ER 609 because they were older than 10 years. 1RP 77; CP 98-99. The court clarified that the convictions were excluded under both ER 608 and ER 609. 1RP 78. In making this ruling, the trial judge reasoned that the evidence was very old and that the prejudicial effect to the State outweighed the probative value to the defense. 1RP 77-78.

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<sup>4</sup> Defense counsel’s trial memorandum asked to admit the following under ER 608: (1) Valenzuela’s “history of using multiple names,” and (2) Valenzuela’s admission during a defense interview to “at least one instance of giving a false name to a police officer during an official contact.” CP 27-29. However, the only supporting documentation provided for this alleged misconduct was the first page of Valenzuela’s criminal history. CP 29, 36. Counsel did not mention this evidence during the CrR 3.6 hearing or motions in limine. Rather, counsel argued for admissibility of Valenzuela’s prior convictions. 1RP 61-64.

During closing argument, the prosecutor argued Brandt's guilt by emphasizing the surveillance video, DOL photos, Crumb's testimony, and Valenzuela's testimony. 3RP 370-74. She reminded the jurors that they could draw their own conclusions about the identity of the suspect in the video by comparing the video with Brandt's DOL photo. 3RP 372. At the end of closing argument, the prosecutor urged the jury to consider the totality of the evidence presented. 3RP 376.

Defense counsel argued that Valenzuela was not credible based on her inconsistent trial testimony, as well as her delayed disclosure to police that she recognized the suspect and that he had apologized for the burglary. 3RP 378-80. Counsel also cited Valenzuela's defensive tone in court as evidence that she had a personal motive for implicating Brandt and that she fabricated her later encounter with him where he apologized for the burglary. 3RP 381-83.

In rebuttal, the prosecutor highlighted the variety of evidence inculpatory Brandt and noted the similarities between him and the suspect pictured in the surveillance video. 3RP 385. She also responded to defense counsel's attack on Valenzuela's credibility by arguing a lack of motive to lie and asking the jury to make an

independent decision as to the witness's credibility. 3RP 387-89.

In conclusion, the prosecutor urged the jury to consider the totality of the circumstances in returning a verdict. 3RP 389.

C. ARGUMENT

1. THE TRIAL COURT EXERCISED PROPER DISCRETION WHEN IT DENIED CROSS-EXAMINATION ON MISDEMEANOR CONVICTIONS THAT WERE APPROXIMATELY 20 YEARS OLD.

Brandt contends that the trial court erred by denying him the opportunity to impeach Valenzuela under ER 608(b) with specific instances of conduct consisting of convictions for giving false information to an officer that were approximately twenty years old at the time of trial. Brandt's claim should be rejected. This evidence was barred by ER 609, the trial court found that it was not relevant and excluded it under ER 608, and other impeachment evidence was available for this witness. The trial court's exclusion of Valenzuela's old convictions was an appropriate exercise of the court's discretion.

a. ER 609 Bars Impeachment With Convictions That Are Greater Than 10 Years Old.

As a preliminary matter, Brandt analyzes the issue of Valenzuela's prior convictions by framing it uniquely as an ER 608 issue, but his argument largely ignores the specific rule of evidence governing the admissibility of prior convictions for crimes of dishonesty or false statement, ER 609. Subsection (b) of this rule provides:

Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction... unless 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).

A ruling regarding impeachment of a witness with prior convictions for crimes of dishonesty is reviewed for an abuse of discretion. State v. Teal, 117 Wn. App. 831, 844, 73 P.3d 402 (2003), aff'd, 152 Wn.2d 333, 96 P.3d 974 (2004). A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds. State v. McDaniel, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996).

In the trial court, Brandt did not argue that these convictions were admissible under ER 609; rather, he argued that they were

admissible under ER 608. 1RP 61-64; CP 27-29. Labeling prior convictions as "specific acts of dishonesty," as Brandt did here, does not allow a party to circumvent ER 609, the rule that regulates admissibility of such evidence. 1RP 63. Not only were the convictions far more than 10 years old, but the court also found that the probative value of the evidence was outweighed by the prejudicial effect. 1RP 78. Because ER 609 specifically relates to the admissibility of prior convictions, the court correctly excluded this evidence.

b. The Trial Court Properly Found That The Evidence Was Irrelevant Under ER 608.

A criminal defendant has the constitutional right to cross-examine and confront the witnesses against him. Delaware v. Van Arsdall, 475 U.S. 673, 678-79, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). That right is subject to the limitation that the evidence used on cross-examination must be relevant. See State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). Under ER 401 and 402, evidence "having 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" is generally admissible. Further, 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...”

ER 403.

Specific instances of conduct, if probative of the witness's truthfulness, are admissible pursuant to ER 608(b):

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...

ER 608(b)(emphasis added).

As stated in the rule, whether to permit such evidence is within the discretion of the trial court, and appellate courts review the trial court's exclusion of evidence for an abuse of discretion. State v. Clark, 143 Wn.2d 731, 766, 24 P.3d 1006 (2001); see also ER 611(a),<sup>5</sup> ER 403, ER 608(b). Precluding cross-examination of a State's witness is an abuse of discretion if the witness is crucial and the alleged misconduct constitutes the only available impeachment.

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<sup>5</sup> This rule states that “[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Clark, 143 Wn.2d at 766. Once a witness is impeached, there is less of a need for further impeachment on cross-examination. Id.

Washington courts allow cross-examination under ER 608(b) where the specific instance of conduct is germane to the trial issues. See e.g., State v. Wilson, 60 Wn. App. 887, 893, 808 P.2d 754 (1991). If the impeachment evidence is only collateral to the issues at trial, the lower court acts well within its discretion by excluding the evidence. State v. York, 28 Wn. App. 33, 35-36, 621 P.2d 784 (1980); see also State v. Griswold, 98 Wn. App. 817, 830-31, 991 P.2d 657 (2000)(the witness's prior false statement was "clearly collateral" and "not germane to the guilt issues here"), abrogated on other grounds by State v. DeVincentis, 98 Wn. App. 817, 991 P.2d 657 (2000).

Here, Brandt's claim likewise fails under an ER 608 analysis. The many years between Valenzuela's misconduct and Brandt's trial rendered these misdemeanor convictions immaterial. The trial court articulated the basis for finding that they were irrelevant: the old age of the convictions and the passage of time. 1RP 63, 78. Moreover, the court specifically addressed admissibility of the evidence under ER 608. 1RP 78. On the record, the trial judge

found that the prejudicial effect outweighed the probative value of the evidence. 1RP 77-78.

Brandt cites to several cases to support his contention that Valenzuela's old convictions were probative and that the trial court erred in excluding them. Yet in each of these cases there was no discussion of the age of the impeachment evidence in determining whether it was relevant.

For example, in State v. Wilson, the court allowed the prosecutor to cross-examine a defense witness (the defendant's wife) about a prior false statement that she had made under oath on a Department of Social and Health Services (DSHS) financial assistance form. 60 Wn. App. at 889, 893. The Court of Appeals found that the prior statement fell within ER 608(b) because it was relevant to the witness's veracity and it was germane to the issue of whether Wilson sexually abused the victim. Id. at 893. Notably, on the DSHS form the witness denied that Wilson lived with her, but at trial she testified that they did live together and therefore he could not have committed sexual abuse without her knowledge. Id. at 889, 893.

Moreover, the Wilson court specified that such impeachment evidence must not be remote in time. Id. at 893. Thus, the court

implicitly found that the witness's prior false statement was not remote. In contrast to the circumstances of Wilson, Valenzuela's prior misconduct was far removed from the time of Brandt's trial.

Brandt also relies on State v. York, where the defendant's convictions for delivery of a controlled substance were reversed because the trial court excluded specific instances of misconduct by a paid informant. 28 Wn. App. at 34-35, 37-38. The Court of Appeals explained that "the defense should have been allowed to bring out the only negative characteristics of the one most important witness..." Id. at 37. However, this opinion likewise did not analyze the age of the impeachment material in finding that the court erred by excluding it.

Finally, Brandt cites to State v. Johnson, where the reviewing court held that it was not an abuse of discretion for the trial court to permit the State to cross-examine a defense witness about previous use of four aliases with police. 90 Wn. App. 54, 71, 950 P.2d 981 (1998). The Johnson court reasoned that this conduct directly related to the witness's general disposition toward truthfulness. Id. Like the other cases that Brandt relies on, the age of the witness's aliases was not at issue in Johnson. Further, Brandt did not establish in the trial court that Valenzuela had used

aliases with police and he did not argue as much on the record; instead, he relied solely on one page of her criminal history that reflected "AKA's" for Valenzuela at some unknown time. CP 36.

In light of the significant differences between these cases and the circumstances in Brandt's case, the trial court correctly ruled that the evidence was inadmissible.

c. There Was Other Impeachment Evidence.

Valenzuela's testimony was important, but her stale convictions were not the only evidence that put her credibility at issue. As noted above, failing to allow cross-examination of a State's witness is an abuse of discretion if the witness is crucial and the alleged misconduct constitutes the only available impeachment. Clark, 143 Wn.2d at 766.

One consideration in determining whether a defendant's Confrontation Clause right to cross-examination was violated is whether the exclusion of evidence left the jury with sufficient information to assess the credibility of the witness. See United States v. Beardslee, 197 F.3d 378, 383 (9<sup>th</sup> Cir. 1999). "The Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in

whatever way, and to whatever extent, the defense might wish.”

Delaware v. Fensterer, 474 U.S. 15, 20, 106 S. Ct. 292, 88 L. Ed. 2d 15 (1985).

Even if this Court finds that Valenzuela was a crucial witness, there was other impeachment evidence available, which defense counsel aptly highlighted. For example: (1) Valenzuela’s story changed as to when she told police that she recognized the suspect in the video, (2) she delayed disclosing the interaction with Brandt where he apologized for the burglary, and her account of when she confronted him varied, and (3) counsel argued that she had an ulterior motive for her testimony based on her defensive tone and demeanor at trial. 2RP 241, 244-45, 257, 259-60; 3RP 275-76, 380-83. Thus, sufficient other evidence tested her credibility and enabled the jury to fully assess her testimony.

d. Any Error Was Harmless.

Even if this Court finds that the trial court erred in precluding questioning about Valenzuela’s prior convictions, any error in the court’s evidentiary ruling was harmless. Reviewing courts do not assume an asserted error is of constitutional magnitude; rather, they look to the defendant’s claim and assess whether, if correct, it

implicates a constitutional interest as compared to a different type of trial error. State v. O'Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). An erroneous ER 608 ruling is not prejudicial unless, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." State v. Ferguson, 100 Wn.2d 131, 137, 667 P.2d 68 (1983). Given the other impeachment evidence available, and the other evidence of Brandt's guilt presented at trial, any error in the court's ruling was harmless.

Brandt characterizes this issue as a Confrontation Clause violation, yet he was not deprived of his right to confront Valenzuela at trial. The court permitted impeachment of this witness with a variety of other evidence, such as Valenzuela's changing story about the timeline of her confrontation with Brandt, her delayed disclosure to the police that she recognized Brandt, and argument regarding her tone and manner while testifying. 2RP 241, 245, 259-60; 3RP 275-76, 380-83. Thus, Brandt was afforded an opportunity to confront this witness and he was able to fully argue his theory of the case, that Valenzuela was not credible, with other impeachment evidence. 3RP 378-83.

Moreover, other evidence inculpated Brandt in the burglary. The jury viewed the surveillance video during trial and was free to make an independent determination as to whether Brandt was the person depicted in the bar breaking into the jukebox. 2RP 233-39; Ex. 4. The jury watched the video again during deliberations. 3RP 404. Two of Brandt's photos from the Department of Licensing were admitted into evidence, one from August of 2011 and one from October of 2012. Ex. 1, 7. The jury had access to these pictures, one of which was taken six months prior to the incident, to compare with the suspect's appearance in the video. This evidence corroborated the State's theory that it was Brandt who committed the burglary.

In short, there is no reasonable probability that the outcome of the trial would have been different if Valenzuela's prior convictions had been admitted. The trial court exercised proper discretion by excluding irrelevant information and finding that it was more prejudicial than probative, but the court did not preclude Brandt from impeaching this witness. Any error in excluding Valenzuela's misdemeanor convictions from approximately twenty years before trial was harmless.

D. CONCLUSION

For the reasons stated above, the State respectfully asks this Court to affirm Brandt's conviction.

DATED this 25 day of November, 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 Eric Broman, the attorney for the appellant, at Nielsen, Broman & Koch PLLC, 1908 E Madison Street, Seattle, WA, 98122, containing a copy of the Brief of Respondent, in State v. Danny Howard Brandt, Cause No. 70204-1, 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.

Dated this 30 day of November, 2014.



Bora Ly  
Done in Seattle, Washington