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Aug 30, 2016  
Court of Appeals  
Division I  
State of Washington

NO. 74314-7-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

PETER McDUFFIE,

Appellant

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

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OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated Peter McDuffie's right to present a defense, contrary to the Sixth Amendment of the United States Constitution and Article I, section 22 of the Washington Constitution.

2. The trial court abused its discretion in allowing a vital witness to invoke a blanket Fifth Amendment privilege, thus curtailing essential cross-examination by Mr. McDuffie.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR.

The right to present a defense, protected by the Sixth Amendment and Article I, section 22, include the right of an accused person to cross-examine witnesses who offer testimony on behalf of the prosecution. Where the trial court curtailed essential cross-examination relevant to the eye-witness's bias and credibility, did the court deprive Mr. McDuffie of his right to present a defense? Where this was the only witness who could identify Mr. McDuffie in the car, can the court's abuse of discretion be considered harmless?

C. STATEMENT OF THE CASE

On the Fourth of July, 2013, Peter McDuffie attended a party in Brier, Washington, with his friend, Joe. RP 267.<sup>1</sup> The two men were invited to the party by Kathleen Stewart, who had met Joe in a Lynnwood bar several days earlier. RP 269. The group drove to the July 4<sup>th</sup> event in Ms. Stewart's bright pink 1994 Mercury Tracer. RP 266-67. At approximately 11:00 p.m., Mr. McDuffie and Joe asked for the car keys, to get Mr. McDuffie's backpack from the rear seat of the car. RP 271-73 (Stewart: "he left his backpack in the backseat of my vehicle for secure purposes, I guess"). At some point, Ms. Stewart saw her vehicle driving away from the party in Brier. RP 274.

Although Ms. Stewart attempted to reach Joe on his cell phone, she did not call the police that evening. RP 281. When Ms. Stewart did contact the Brier Police Department, she reported that she had left her car unlocked, with the keys inside the car. RP 281-82. Ms. Stewart also told Brier police that she did not know who might have taken her car. RP 303.

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<sup>1</sup> The full name of Mr. McDuffie's friend, Joe Barlesh, was not heard by the jury. Mr. Barlesh did not testify at trial. RP 33-34, 267.

Approximately three weeks later, on July 24, 2013, a car was pulled over in Kirkland for a traffic stop. RP 435-36. Kirkland Police Officer Daniel Gaud spotted an older model pink Mercury crossing the center line; because he could not read the license plate, he tried to follow the car. RP 437-38. The car abruptly turned into a parking lot, and the driver opened the car door and ran off. Id. Officer Gaud stated the driver was a white male with blondish hair, approximately 5'4" to 5'5" and 140 to 150 pounds. RP 439.

Officer Gaud stayed with the vehicle and spoke with the passengers, including Iliana McElrone, who refused to give a statement. RP 446.<sup>2</sup> Ms. McElrone became an important witness for the State, as she was the sole person who identified Mr. McDuffie as the driver of the missing pink Mercury Tracer at the time of the stop on July 24th. Officer Gaud did not identify Mr. McDuffie, either in or out of court, as the driver.

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<sup>2</sup> At some point later, Ms. McElrone was charged with theft by deception in a case involving a stolen U-Haul truck. RP 390, 399-401 (McElrone also possessed various ID cards, credit cards, and shaved keys to other cars).

Mr. McDuffie, who was later arrested, was charged with possession of a stolen motor vehicle, as well as obstructing a law enforcement officer. CP 1-2.

At trial, Officer Gaud testified that on July 24th, he recovered Mr. McDuffie's backpack from the rear seat of the car, where it had been placed weeks before at the July 4<sup>th</sup> party. RP 271-72, 460, 477. Officer Gaud stated that he recovered other items from the front console, such as Mr. McDuffie driver's license and cell phone. RP 452-55. However, the photographs of the car interior that the officer claimed he took -- including those that would have shown where each of Mr. McDuffie's belongings was actually recovered -- were not produced by the State at trial. RP 482.

Ms. McElrone also testified at trial, stating that Mr. McDuffie was the driver of the Mercury on July 24<sup>th</sup>, when the group was pulled over by Officer Gaud. RP 409-12. Ms. McElrone testified with her criminal defense attorney seated next to her. RP 390. Despite Mr. McDuffie's request to examine Ms. McElrone pursuant to ER 608(b) (past conduct involving dishonesty), the court limited Mr. McDuffie to one question -- whether Ms. McElrone rented a U-Haul using someone else's ID. RP 418. She asserted her 5<sup>th</sup> Amendment privilege. Id.

In addition, Officer Gaud testified that the driver of the stolen Mercury was shirtless and had no tattoos. RP 480. Mr. McDuffie, in contrast, has a large tattoo of his Zodiac sign on his upper back, which he has had since 2008. RP 498-99. Mr. McDuffie displayed his tattoo for the jury during his testimony. Id. Mr. McDuffie also showed the jury a photograph of his back from 2011, to substantiate the fact that this tattoo already existed when the driver of the stolen car was pulled over in July 2013. RP 500 (showing redacted booking photograph).

Following a jury trial, Mr. McDuffie was convicted as charged. CP 78-79; RP 580. He appeals. CP 117-26.

D. ARGUMENT

THE COURT DENIED MR. McDUFFIE THE RIGHT TO PRESENT A DEFENSE BY LIMITING HIS CROSS-EXAMINATION OF AN ESSENTIAL WITNESS.

Prior to trial, defense counsel stated he had recently discovered that Ileana McElrone, the sole eyewitness to Mr. McDuffie's alleged presence in the stolen car on the night of its recovery, was herself facing charges for possession of a different stolen vehicle. RP 30, 49. Ms. McElrone's credibility and motive to lie were essential to Mr. McDuffie's claim of misidentification. In addition, the fact that the State had failed to disclose Ms. McElrone's arrest for several months

was a violation of the State's responsibilities under Brady.<sup>3</sup> RP 30, 49, 89, 100.

In addition, rather than requiring Ms. McElrone to invoke her Fifth Amendment privilege with regard to each question about her new stolen vehicle case, the court precluded all but one of Mr. McDuffie's cross-examination questions on the topic. RP 396. By doing so, the court abused its discretion.

1. The court's limitation of cross-examination denied Mr. McDuffie his right to present a defense.

The Sixth and Fourteenth Amendments separately and jointly guarantee an accused person the right to a meaningful opportunity to present a defense. Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct 1727, 164 L.Ed.2d 503 (2006); U.S. Const. Amends. VI, XIV. Article I, section 22 of the Washington Constitution provides a similar guarantee. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). A defendant must receive the opportunity to present his version of the facts to the jury so that it may decide "where the truth lies." Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019

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<sup>3</sup> Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215(1963). The court denied Mr. McDuffie's request to exclude Ms. McElrone's testimony as a remedy for the Brady violation. RP 103.

(1967); Chambers v. Mississippi, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). “[A]t a minimum, . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt.” Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

2. The Fifth Amendment privilege must be balanced with Sixth Amendment rights and applied narrowly.

Despite the fundamental right to call witnesses, “a valid assertion of the witness’ Fifth Amendment rights justifies a refusal to testify despite the defendant’s Sixth Amendment rights.” United States v. Goodwin, 625 F.2d 693, 700 (5th Cir. 1980). The constitutional right not to be a witness or give evidence against oneself includes the right of a witness not to give incriminating answers in any proceeding. Kastigar v. United States, 406 U.S. 441, 445-46, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972). Further, the answer need only furnish a link in the chain of evidence needed to prosecute the witness for a crime in order to be incriminating under the Fifth Amendment. Hoffman v. United States, 341 U.S. 479, 486, 71 S.Ct. 814, 95 L.Ed. 1118 (1951).

But where a witness invokes the Fifth Amendment privilege, the privilege must be applied narrowly and is applicable only where the witness has “reasonable cause to apprehend danger from a direct answer.” Id. A claim of privilege must be supported by facts which, aided by the “use of reasonable judicial imagination,” show the risk of self-incrimination. State v. Lougin, 50 Wn. App. 376, 381, 749 P.2d 173 (1988). The danger of incrimination must be substantial and real, and not merely speculative. State v. Hobble, 126 Wn.2d 283, 290, 892 P.2d 85 (1995).

Moreover, once the judge determines a witness has a legitimate Fifth Amendment claim, the judge must still determine the proper scope of the privilege. “Although the witness may have a valid claim to the privilege with respect to some questions, the scope of that privilege may not extend to all relevant questions.” Goodwin, 625 F.2d at 701. A finding of a valid Fifth Amendment claim “does not normally foreclose all further questions.” Id. In general, a claim of privilege may be raised only against specific questions, and not as a blanket foreclosure of testimony. Lougin, 50 Wn. App. at 381 (trial court must exercise its discretion “under all of the circumstances then present”).

3. The court erred when it limited cross-examination of Ms. McElrone to one question about her new crime.

Iliana McElrone's testimony about her new stolen vehicle case was essential to the jury's assessment of her credibility and her motive to lie. This information was critical to Mr. McDuffie's identification defense, since Ms. McElrone was the only person who testified that Mr. McDuffie was driving the stolen car. RP 409-12.

Although Ms. McElrone might have had a valid Fifth Amendment claim as to some areas of inquiry, the trial court erred when it found the witness could legitimately refuse to answer all but one of Mr. McDuffie's relevant questions concerning her arrest for possession of a stolen U-Haul truck. RP 396. If Mr. McDuffie had been permitted to properly cross-examine, Ms. McElrone could have invoked her Fifth Amendment privilege as to certain questions as appropriate, since her attorney was seated beside her. RP 390. This would not have foreclosed all relevant questions.<sup>4</sup> The trial court issued what amounted to a blanket preclusion of questioning regarding

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<sup>4</sup> Defense counsel, in an offer of proof, listed all of the questions he would have asked, had the court not restricted his questioning. RP 399-401.

Ms. McElrone's new case, instead of the narrowly-tailored, question-by-question approach suggested by Mr. McDuffie. RP 396.

Where a court excludes evidence of probative value, our Supreme Court has held, "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. I, § 22." Jones, 168 Wn.2d at 720 (quoting State v. Hudlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983)). The Jones Court held that where the trial court had excluded "essential facts of high probative value," the defendant was "effectively barred ... from presenting his defense," in violation of the Sixth Amendment. 168 Wn.2d at 721.

Because the court's error in interfering with Mr. McDuffie's right to cross-examine the State's primary eyewitness violated Mr. McDuffie's constitutional right to present a defense, this Court may affirm only if the State proves beyond a reasonable doubt that the error was harmless. State v. Levy, 156 Wn.2d 709, 731-32, 132 P.3d 1076 (2006); Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Neder v. U.S., 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); Jones, 168 Wn.2d at 724. Due to the importance of this testimony to Mr. McDuffie's identification defense, the State

cannot make that showing. Reversal of the convictions is therefore required.

Ms. McElrone was the only eyewitness who could identify Mr. McDuffie on the night the stolen car was pulled over; therefore her credibility and motive to lie were essential to his misidentification defense. When it became clear that Ms. McElrone was directly involved with the possession of another stolen motor vehicle, and that the new case was charged as “by color or by aid of deception,” this was directly relevant to her credibility. RP 396 (Ms. McElrone was arrested with identification documents and credit cards belonging to various individuals, as well as shaved keys that could be used to start a number of different cars).

The unimpeached testimony of Ms. McElrone lent credence to the State’s theory that Mr. McDuffie was the driver of the stolen vehicle in the instant case, and that Ms. McElrone was simply an innocent passenger. The reality that Ms. McElrone was a known car and identity thief, while Mr. McDuffie had a clean record, would have provided some needed context – specifically, Ms. McElrone’s less than stellar credibility, her bias, and whether she had a motive to fabricate, such as a deal to testify for the State.

Without the evidence of Ms. McElrone's most recent crimes, the jury could draw no other conclusion but that Mr. McDuffie had committed the acts of which he was accused. But had the evidence of Ms. McElrone's acts of dishonesty and theft been revealed, the impact of her testimony would have been greatly reduced.

The State cannot prove beyond a reasonable doubt that the exclusion of relevant evidence, nor that the limitation of Mr. McDuffie's cross examination of this witness, were harmless. This Court should, therefore, reverse.

Even if the trial court's error is not found to be of constitutional magnitude, "Failing to allow cross-examination of a state's witness under ER 608(b) is an abuse of discretion if the witness is crucial and the alleged misconduct constitutes the only available impeachment." State v. Clarke, 143 Wn.2d 731, 766, 24 P.3d 1006, cert. denied, 534 U.S. 1000 (2001) (citing State v. York, 28 Wn. App. 33, 621 P.2d 784 (1980)). The alleged victim's credibility, her bias, and her motivation to lie were highly relevant to the State's case. The proffered evidence was powerful impeachment evidence. The trial court abused its discretion in excluding it.

E. CONCLUSION

Under either analysis, Peter McDuffie respectfully asks this Court to reverse his convictions and sentence and remand for a new trial.

DATED this 30<sup>th</sup> day of August, 2016.

Respectfully submitted,

s/ Jan Trasen

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 74314-7-I
	)	
PETER MCDUFFIE,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30<sup>TH</sup> DAY OF AUGUST, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] PETER MCDUFFIE 3635 NE 6 <sup>TH</sup> ST RENTON, WA 98056	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 30<sup>TH</sup> DAY OF AUGUST, 2016.



X \_\_\_\_\_

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