

NO. 44321-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

CLAY JONAK,

Appellant.

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

The Honorable Dennis Maher, Commissioner

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court improperly excluded evidence of a key prosecution witness's bias, denying appellant his constitutional right of confrontation.

Issue pertaining to assignment of error

Appellant was charged with first degree theft and the State presented testimony from a former friend of appellant's who said he admitted committing the theft. When appellant attempted to testify about an email he received from the witness which would demonstrate her bias, the court excluded the evidence for lack of foundation. Where the defense offered evidence from which a jury could find the email was sent by the prosecution witness, did the wrongful exclusion of evidence of that witness's bias deny appellant his constitutional right of confrontation?

B. STATEMENT OF THE CASE

1. Procedural History

On April 30, 2012, the Cowlitz County Prosecuting Attorney charged appellant Clay Jonak with one count of first degree theft. CP 1-2; RCW 9A.56.030(1)(a) and RCW 9A.56.020(1)(a). The case proceeded to a jury trial before the Honorable Dennis Maher, and the jury returned a guilty verdict. CP 34. The court imposed a standard range sentence of 60 days, and Jonak filed this timely appeal. CP 35-47.

2. Substantive Facts

Clay Jonak was charged with first degree theft of some dredging equipment owned by Manson Construction. He admitted taking three items belonging to Manson from Longview Booming, where they were stored, and recycling them. RP 349-50. He testified, however, that he was given permission to do so by Bob Richardson, Manson's Northwest Dredging Operations Manager. RP 107, 363. Richardson admitted that he discussed the recycling project with Jonak, but he testified he had not given Jonak permission to get started. RP 112-13. The State's case against Jonak rested on the resolution of this dispute.

There was no dispute that Jonak lived on property adjacent to Longview Booming for several years. RP 102, 235, 334. The properties shared an access road and a locked gate, to which Jonak had the key code. RP 247, 335. It was also undisputed that Manson Construction stored a large amount of dredging equipment on the property, which had gone unused for years. RP 102, 234.

Jonak owns a metal recycling business, and in March 2012, he contacted Manson to inquire whether they were interested in recycling the unused equipment in Longview. RP 93, 108, 335, 338-39. He drove to Manson's Seattle office to discuss his proposal, where he was introduced

to Richardson, who he was told had authority to set up contracts for recycling metals. RP 94, 104, 108, 340.

Jonak testified that he told Richardson what his company does, and he proposed recycling everything Manson wanted recycled and splitting the proceeds. RP 341. Richardson asked him to come back with a diagram and some photographs of the equipment stored in the Longview yard. RP 344.

Roger Ison was with Jonak during the first meeting with Richardson. RP 127, 184. Ison testified that Richardson told Jonak that as far as he was concerned, Jonak could scrap the equipment at the Longview yard, but he needed to work out some details first. RP 185, 191.

Richardson testified, on the other hand, that he told Jonak he was not sure what equipment was stored at the Longview yard and what the company would want to scrap. He testified that he told Jonak he would set up a meeting in Longview with his boss to identify the items that would be recycled. RP 109-111.

A few days later Jonak returned to Richardson's office in Seattle with a diagram of the equipment located at the Longview yard. RP 112, 344. Jonak testified that Richardson told him the equipment was pretty much scrap, and he should go ahead and get started with the recycling. RP 346. Richardson testified that he told Jonak he had no problem using him

to scrap the items stored in the Longview yard. He testified that he did not tell Jonak they had a contract or that he could get started on the project, however. RP 112-13.

After that second meeting, Jonak recycled three items from the Longview yard. RP 349. He drove to Seattle a third time but was unable to meet with Richardson, who was in Mexico on business. RP 127, 348. Jonak testified that he left the receipts from the recycling transactions with Richardson's secretary. RP 352-53.

Richardson set up a meeting at the Longview yard on April 23, 2012, with Jonak and Eric McMann and Jim McNalley from Manson Construction. RP 116, 145. According to Richardson, the purpose of the meeting was to determine what items, if any, would be recycled. RP 111. Although Richardson had told Jonak he would likely be given the contract to do the recycling, he had not mentioned that agreement to anyone else at Manson before the meeting. RP 135, 146, 154. Jonak's understanding was that the purpose of the meeting was to finalize the financial terms of the agreement. RP 346, 352.

When the people from Manson discovered that items were missing from the yard, they called the property owner and the sheriff's office. RP 152. Jonak testified that, at that point, he asked Richardson if he was going to say anything about their recycling agreement. When Richardson

did not speak up, Jonak realized something was wrong, and he started getting concerned. RP 356-57. Jonak did not say anything to McMann about the agreement, because he was relying on Richardson to do that. RP 381. Jonak was asked if he had taken any of the missing property, and he said he had not. RP 152, 245. He explained at trial that he meant that he did not commit theft. RP 378.

The deputy who investigated the report noticed some distinctive tire tracks in the area where the missing equipment had been, which he determined were consistent with a crane parked near Jonak's residence. RP 259. When the deputy asked Jonak about the crane, he said it had not been operational for two and a half to three months. RP 271. Jonak told the deputy that no one else had access to the crane. RP 275. Jonak gave the deputy a written statement, in which he denied taking part in or having any knowledge of a theft, and the deputy left. RP 276, 294.

Two days later, after finding evidence that Jonak had recycled items from the Longview yard at Bob's Metals in Portland between March and April 2012, the deputy returned and arrested Jonak. RP 277-78, 82. When the deputy described the evidence he had gathered, Jonak commented that Richardson had thrown him under the bus. RP 283. Jonak told the deputy that Richardson had given him permission to recycle the Manson materials. RP 286.

In August 2012, Sharon Gaines contacted the prosecutor to provide information about Jonak. RP 224. Gaines and Jonak had a brief relationship more than 20 years ago, and they have a daughter together. RP 219. According to Gaines, Jonak contacted her in May 2012 saying he had been arrested for theft and he was in a lot of trouble. Jonak invited her to come to Washington from Texas and share his house. RP 220. When she arrived in June, she felt she had been misled about the conditions of Jonak's home. She did not feel it was a safe place to live with her two children, one of whom is disabled, and she stayed with Jonak only a few days. RP 221, 230.

Gaines testified that she asked Jonak about the theft charge, and he told her that he took some items from his landlord's property, broke them down, and recycled them for money. She claimed Jonak told her that the police were not going to do anything because they had no evidence against him. RP 222-23.

Jonak testified that Gaines had made contact with him by email in the spring of 2012. RP 365. After exchanging a few emails, they spoke on the phone, and he told her he potentially needed someone to care for his home as a result of his arrest. He invited her to come to Longview, and she accepted. RP 366-67. After a subsequent conversation Jonak told Gaines not to come to Longview, but she came anyway. RP 368-69.

Gaines and her children stayed with Jonak for four days, until he located a homeless shelter that could accommodate her disabled child. RP 370-71.

Although she claimed she lost everything she owned in the process of moving to Washington to help Jonak, Gaines denied harboring any resentment toward him, saying she was “impartial.” RP 225-26. The defense attempted to demonstrate Gaines’s bias, and impeach her testimony that she was impartial, through an email containing derogatory comments about Jonak. RP 376.

First, counsel showed the email to Gaines on cross examination, and she denied sending it. RP 227-28. Jonak then testified that he received the email from Gaines in July 2012, shortly before she contacted the prosecutor. RP 374. He recognized the email address as the one Gaines had used to contact him before she moved to Longview. RP 372.

The prosecutor objected that the defense could not establish the foundation for that email, and defense counsel asked additional questions to authenticate it. RP 372. Jonak testified that in addition to the address he recognized as Gaines’s, the email contained information that only Gaines would know. RP 373-74. When defense counsel asked Jonak about the contents of the email, the prosecutor objected that the email was hearsay and argued that Jonak had not established that Gaines sent the email because there was no evidence connecting the email to a particular

IP address or server. RP 374. Counsel responded that Jonak had adequately identified the email as coming from Gaines by the address and the content. RP 374. The court sustained the prosecutor's objection based on lack of foundation. RP 376.

C. ARGUMENT

THE TRIAL COURT DENIED JONAK HIS CONSTITUTIONAL RIGHT OF CONFRONTATION BY EXCLUDING EVIDENCE OF A KEY PROSECUTION WITNESS'S BIAS.

A criminal defendant has a constitutional right to impeach a prosecution witness with evidence of bias. Davis v. Alaska, 415 U.S. 308, 316-18, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); State v. Spencer, 111 Wn. App. 401, 408, 45 P.3d 209 (2002), review denied, 148 Wn.2d 1009 (2003). The bias of a witness is always relevant to discredit that witness's testimony. Davis, 415 U.S. at 316. Not only must the defendant be allowed to cross examine the prosecution witness about statements indicating bias, the defense must also be permitted to introduce extrinsic evidence of such bias through the testimony of other witnesses. Spencer, 111 Wn. App. at 408; State v. McDaniel, 37 Wn. App. 768, 772-73, 683 P.2d 231 (1984); State v. Jones, 25 Wn. App. 746, 751, 610 P.2d 934 (1980). A trial court's decision denying the defendant this right is reversible error. Spencer, 111 Wn. App. at 408.

In this case, the court denied Jonak the opportunity to establish Gaines's bias through evidence of an email he received from her, which contained derogatory comments aimed at Jonak. RP 376. Gaines testified that she was impartial with regard to Jonak and that she only felt sorry for him. RP 226, 230. Jonak attempted to rebut this suggestion that she harbored no resentment which could influence her testimony by testifying about an email he received from Gaines shortly before she contacted the prosecutor's office to report that Jonak admitted committing the charged theft. RP 372-74. But the court excluded all evidence regarding the email, ruling that it lacked the proper foundation. RP 376. Not only was the court's ruling incorrect, but it violated Jonak's right to impeach this prosecution witness with evidence of bias.

First, Jonak properly established the foundation for evidence of the email from Gaines. Under ER 901(a), the requirement of authentication or identification is satisfied by prima facie evidence that the evidence is what it is purported to be. State v. Williams, 136 Wn. App. 486, 499, 150 P.3d 111 (2007) (citing State v. Payne, 117 Wn. App. 99, 106, 69 P.3d 889 (2003), review denied, 150 Wn.2d 1028 (2004)). The court need not make a definitive finding of authenticity. Rather, so long as there is evidence from which a jury could find that the evidence is what it is claimed to be, the proper foundation is established. Id. The prima facie showing may be

made by testimony of a witness with knowledge, or by “[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.” ER 901(b)(1), (4).

Here, Jonak testified that the email in question was sent from the address he recognized as Gaines’s, as it was the same address from which he had received emails from her before she moved to Washington. RP 372. In addition, he knew the email came from Gaines because it contained information that only she would know. RP 373-74. Based on this testimony from a witness with knowledge, as well as the content which identifies the sender, a reasonable jury could determine that Gaines sent the email in question, and therefore a sufficient foundation was established. See ER 901(a); State v. Kinard, 109 Wn.App. 428, 436, 36 P.3d 573 (2001), review denied, 146 Wn.2d 1022 (2002) (requirement of authentication satisfied by testimony from witness with knowledge that matter is what it is claimed to be). The court abused its discretion in excluding the evidence for lack of foundation.

Moreover, the trial court’s discretion in excluding evidence is limited by the defendant’s constitutionally guaranteed right to confrontation. See State v. Ellis, 136 Wn.2d 498, 504, 963 P.2d 843 (1998); U.S. Const. Amend. VI; Wash. Const. art. I, § 22. A defendant’s right to confrontation includes the right to impeach the State’s witness

with evidence of bias. State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998).

This Court has recognized that “the defendant should be afforded broad latitude in showing the bias of opposing witnesses.” Spencer, 111 Wn. App. at 411. Here, Gaines contacted the prosecutor’s office in August 2012, claiming that Jonak had admitted to her that he stole the property from Manson Construction. There was evidence that Gaines felt she had been mistreated by Jonak, and although she claimed at trial that she was an impartial witness, evidence that she sent Jonak an angry and insulting email just prior to contacting the prosecutor’s office would have demonstrated her bias against Jonak and cast doubt on her credibility. The jury was entitled to have that evidence before them so they could make an informed decision as to the weight to put on Gaines’s testimony. See Davis, 415 U.S. at 317-18.

Because a defendant’s right to impeach a prosecution witness with evidence of bias is guaranteed by the constitutional right to confront witnesses, any error in excluding such evidence is subject to the constitutional harmless error analysis. Thus, the error is presumed prejudicial and requires reversal unless it was harmless beyond a reasonable doubt. Johnson, 90 Wn. App. at 69 (citing Davis v. Alaska, 415 U.S. at 318). That presumption cannot be overcome in this case.

The State's theory of the case was that Jonak, who had lived next to the Longview yard and had access to the unattended Manson equipment for years, and who had driven from Longview to Seattle three times to work out the terms of an agreement to recycle that equipment, suddenly decided to steal the equipment instead. Gaines's testimony that Jonak told her he committed the theft because he was having financial difficulties lent needed weight to the State's theory. Because the jury might not have convicted Jonak if it was permitted to consider the evidence of Gaines's bias against him, the court's error in excluding evidence about the email cannot be considered harmless. Jonak's conviction must be reversed and the case remanded for a new trial.

D. CONCLUSION

The trial court denied Jonak his constitutional right of confrontation by excluding evidence of a key prosecution witness's bias. Jonak is entitled to a new trial.

DATED June 28, 2013.

Respectfully submitted,



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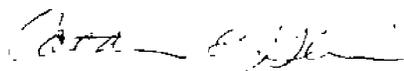
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Longview, WA 98632

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Catherine E. Glinski  
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