IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHAMROEUM NAM, Appellant.	No. 36468-9-II UNPUBLISHED OPINION

Penoyar, J. — Chamroeum Nam appeals his attempted first degree kidnapping (domestic violence) conviction. Nam argues that the trial court erred when it ruled that defense counsel could only ask the prosecution's chief witness open questions regarding an alleged statement of bias. We reverse Nam's conviction because the trial court denied him his constitutional right to impeach a prosecution witness with evidence of bias.

FACTS

I. Background

In early 2004, Nam, Tanya Harris, and their child were living with Harris's father in Lacey. A week before the incident leading to Nam's conviction, Harris asked Nam to move out. Nam responded to Harris's request by pushing her onto their bed and telling her, "I'm not going anywhere. You're not going to take my son away from me." 2 Report of Proceedings (RP) at 191. Nam then moved out of the residence.

On March 6, 2004, Harris received a call from Nam. Nam stated that he wanted to see his child "right now." 2 RP at 192. Harris told Nam he could not see his child and to call her back in a week. About ten minutes later, Harris left her father's house to pick her stepfather up from the

airport.

When Harris pulled out of the driveway, she saw Nam in a red car parked a few houses up the street. She rolled down her window and asked him what he was doing. He replied that he wanted to see his child. Nam approached Harris's vehicle, stuck his hand through the window of her car, and opened the door. He then shoved Harris's head against the passenger's seat. Harris screamed for help, honked the car's horn, and kept her foot on the brake. Harris testified that she believed Nam intended to drive away with her in the vehicle. Nam began to choke Harris, shoved her head onto his lap, and covered her mouth. Harris testified that she tried to pull the keys out of the ignition and that she and Nam struggled for the keys. Nam tried to shift the car into drive, while she tried to shift the car into park.

Nathan Clinton, who was visiting his in-laws at a house next door, heard a car's horn and went outside to investigate. He observed a struggle between two people. Clinton testified that the man was partially inside and partially outside the car. When Clinton called the police, he stated that it appeared that the man was trying to pull the woman out of the car. Clinton testified that Harris told him that Nam tried to get into the car and drive away.

The State charged Nam with attempted first degree kidnapping and first degree robbery,[1] alleging domestic violence in both counts. At trial, Nam sought to ask Harris on cross-examination whether she had told Nam's sister that she "'[was] willing to do anything to make sure [Nam] went to jail.'" *State v. Nam*, No. 33567-1-II, slip op. (unpublished portion) at ¶ 31 (2007). The trial court excluded this testimony as impermissible hearsay. *Nam*, No. 33567-1-II,

[1] In Nam's first trial, Harris testified that Nam robbed her during the attack by taking her purse. *State v. Nam*, 136 Wn. App. 698, 702, 150 P.3d 617 (2007) (published in part).

slip op. (unpublished portion) at ¶ 31. The jury convicted Nam on both counts. *Nam*, 136 Wn. App. at 704.

We subsequently reversed Nam's robbery conviction based on insufficient evidence that he took Harris's purse from her person. *Nam*, 136 Wn. App. at 707. We also reversed the attempted first degree kidnapping charge because the trial court erred by improperly excluding evidence of Harris's bias during Nam's cross-examination. *Nam*, No. 33567-1-II, slip op. (unpublished portion) at ¶¶ 36-37, 39. On April 10, 2007, the State again charged Nam with one count of attempted first degree kidnapping (domestic violence).

II. Trial

During the second trial, defense counsel sought to make an offer of proof that Harris had told Nam's sister, Charmaine Berry, that Harris would do anything to put Nam in jail. The defense, however, did not have sufficient evidence to complete an offer of proof, as counsel was unable to contact Berry and he had no notes that Berry made that statement to counsel.

The trial court told defense counsel, "I have to have some basis to allow that question . . . . [T]he rule is you can't ask the question about a fact not in evidence, and I don't have any evidence now." 2 RP at 164. The trial court also stated, "There has to be some evidence that would show that bias. It can't be just a fishing expedition to show bias." 2 RP at 164-65. The trial court ruled that defense counsel could not ask Harris whether she had made the alleged statement but that it could ask Harris an open-ended question that did not suggest an answer. The trial court stated:

> [W]e'll see how her direct examination is and what doors might be opened to that. I would even let you go so far as to confirm with her that she had conversations with Miss Berry and see if to an open-ended question she'll say anything. But in an effort to be fair here. But unlike the usual rule in cross-examination where you

> can suggest answers, I'm not going to let you suggest that answer to her putting that in the jury's mind without some basis in fact that it actually took place. Now, if she'll volunteer it, I'll let you test the water that far.

2 RP at 165.

The trial court also stated:

> I would not ordinarily even make the suggestion I made were it not for the Court of Appeals' opinion leading me to believe there was some basis for this in the prior trial. And you've informed me that you're well aware of their opinion and that there was never an offer of proof in the prior trial regarding this. Without that offer being sufficiently made here, I've not allowed the specific question to be asked in the form [counsel] wants to ask it, but in light of the Court of Appeals' opinion, I've given some leeway for an open-ended question that doesn't suggest the answer.

2 RP at 166-67. There is no record that defense counsel asked Harris any questions regarding Berry.

The jury found Nam guilty of attempted first degree kidnapping, and the trial court sentenced Nam to 66 months' confinement. Nam now appeals.

ANALYSIS

Nam contends that the trial court violated his constitutional right to present a complete defense when it ruled that he could only question Harris in general terms about a statement she may have made indicating bias.[2] The State argues that the trial court did not exclude the alleged statement because Nam could ask general questions and, therefore, defense counsel made a

[2] Nam phrases this issue as a violation of the "due process right to present a complete defense[,]" but we characterize his claim as an issue under the confrontation clause of the Sixth Amendment to the United States Constitution. Appellant's Br. at 1. A defendant's right to impeach a prosecution witness with evidence of bias is guaranteed by the constitutional right to confront witnesses. *State v. Johnson*, 90 Wn. App. 54, 69, 950 P.2d 981 (1998) (citing *Davis v. Alaska*, 415 U.S. 308, 315-318, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974)).

tactical decision to forego asking Harris questions. We agree with Nam.

We review de novo alleged violations of the confrontation clause. *State v. Kirkpatrick*, 160 Wn.2d 873, 881, 161 P.3d 990 (2007); *State v. Chambers*, 134 Wn. App. 853, 858, 142 P.3d 668 (2006).[3] A defendant has a constitutional right under the Sixth Amendment of the United States Constitution to impeach a prosecution witness with evidence of bias. *Davis v. Alaska*, 415 U.S. 308, 315-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *see State v. Johnson*, 90 Wn. App. 54, 69, 950 P.2d 981 (1998). "It is fundamental that a defendant charged with the commission of a crime should be given great latitude in the cross-examination of prosecuting witnesses to show motive or credibility." *State v. Wilder*, 4 Wn. App. 850, 854, 486 P.2d 319 (1971). The cross-examiner must have a good faith basis for the query. 5A Karl B. Tegland, Washington Practice: Evidence Law and Practice § 607.9, at 396 (5th ed. 2007). An error excluding bias evidence is presumed prejudicial but is subject to a harmless error analysis. *State v. Spencer*, 111 Wn. App. 401, 408, 45 P.3d 209 (2002). Reversal is required unless the State can prove beyond a reasonable doubt that the unconstitutional act did not prejudice the defendant and that he would have been convicted even if there had been no error. *State v. Fitzsimmons*, 93 Wn.2d 436, 452, 610 P.2d 893 (1980), *overruled on other grounds by City of Spokane v. Kruger*, 116 Wn.2d 135, 803 P.2d 305 (1991); *Johnson*, 90 Wn. App. at 69.

The trial court denied Nam his constitutional right to impeach Harris with evidence of bias when it precluded defense counsel from directly asking Harris if she had ever said "she was willing

[3] While *Kirkpatrick*, 160 Wn.2d at 881, and *Chambers*, 134 Wn. App. at 858, hold that the standard of review is de novo, other authority concludes that the standard is abuse of discretion. *State v. Kilgore*, 107 Wn. App. 160, 185, 26 P.3d 308 (2001); *see State v. Mak*, 105 Wn.2d 692, 710, 718 P.2d 407 (1986).

to do anything to make sure that Mr. Nam went to jail." 2 RP at 162. Nam should have been given great latitude in his cross-examination of Harris. We are aware of no precedent supporting the proposition that, where it is possible a witness may deny a prior statement, there must be an offer of proof of evidence to refute that denial. Such a rule would severely restrict legitimate cross-examination. Moreover, defense counsel acted in good faith when seeking to ask Harris about the alleged statement of bias. In 2007, we reversed Nam's conviction, holding that it was prejudicial error for the trial court to exclude Nam from asking Harris the same statement at issue in this case. *Nam*, No. 33567-1-II, slip op. (unpublished portion) at ¶ 36. The defense was aware of our court's ruling and rationally sought to impeach Harris with the same question at Nam's second trial. Where counsel has a good faith belief that an adverse witness may have made an inconsistent prior statement or a statement demonstrating bias, counsel should be allowed to confront the witness with that statement.

Furthermore, the trial court's ruling was not harmless because Harris's testimony was crucial to the State's case. The combined testimony of the other witnesses at trial would not be sufficient to convict Nam for attempted first degree kidnapping. We reverse because Nam's conviction rests on Harris's credibility.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Van Deren, C.J.

Houghton, J.