COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, Colorado 80203	
Appeal from Custer County District Court, Case No.03 CR 24, Hon. Julie Marshall, Judge	
Plaintiff-Appellee: People of the State of Colorado, **vs.** **Defendant-Appellant: Linda Z. Cary**	**COURT USE ONLY**
Paul Grant 6053 South Quebec Street, # 101 Centennial, Colorado 80111 303-771-1908 Reg. # 26073 Counsel for Ms. Cary	Case Number: 04 CA 2235

REPLY BRIEF

The Defendant-Appellant, Linda Cary, respectfully submits her Reply Brief.

INTRODUCTION

The Attorney General argues that the trial court properly prohibited the defendant from offering evidence to impeach the defendant's main accuser, David Nequette. Nequette threatened the life of witness Robert Saint Amour if Saint Amour did not come in and testify in support of Nequette's accusations that Linda Cary

Embezzled money from his company. Saint Amour was also prohibited from testifying that he prepared his reports of the company's books, which reports the prosecution used to support the charges of embezzlement, based on Nequette's explanations as to what were allowable expenses and as to what were company policies for credit card use, etc. Saint Amour would also have testified (but the trial court disallowed this testimony) that he later learned from other company employees that Nequette had lied to him about standard company polices, and that would have changed his report.

The attorney general also supports the trial court's decision not to allow character evidence to show that Nequette was an untruthful person.

This trial was all about credibility. If David Nequette threatened a witness if he would not support Nequette's testimony, and offered that witness a reward if he would support Nequette and the trial turned out "right," then the jury had the right to hear that. If David Nequette was known to be an untruthful person, the jury had the right to hear that. If Nequette instructed Saint Amour to prepare accounting reports in a manner that would show that Linda Cary took money she was not authorized to take, knowing that his instructions to Saint Amour were based on lies as to company policy and practice, the jury had a right to know that.

The right to confront your accuser includes the right to challenge the credibility of your accuser. Ms. Cary was denied that right because the trial court did not protect the defendant's Sixth Amendment right of confrontation. The trial court interfered with Ms. Cary's rights when she ruled that evidence of Nequette's dishonesty was irrelevant because the best defense of an accused person is often the impeachment of the accusers.

ARGUMENT

The partiality of a witness is subject to exploration at trial, and is always relevant as discrediting the witness and affecting the weight of his testimony. *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (internal quotation omitted).

The attorney general ignores the Supreme Court's teachings in *Davis v. Alaska* in his Answer Brief, and also ignores all United States Supreme Court precedent, despite the fact that Ms. Cary's arguments raise federal constitutional issues. In reading the Answer Brief, citing Colorado cases exclusively, it almost appears as if the attorney general is not aware of the Supremacy Clause. See Art. VI, Sec. 2, United States Constitution.

The attorney general argues that it would have been an unfair attack on Nequette, to allow Saint Amour to testify about Nequette's threats against Saint

Amour (which caused Saint Amour to fear for his life), and offers of rewards if the case turned out right, which were made in order to influence the testimony of Saint Amour. Answer Brief at 12.

The attorney general offers as authority to support this weak attempt to rationalize the trial court's ruling to exclude important impeachment evidence, a case out of the 7th Circuit - to which Colorado does not even belong - in which the appellate court had found it unfairly prejudicial to allow testimony to show that a witness against the defendant had been threatened, where there was nothing at all that would link the threat to the defendant. *See Dudley v. Duckworth*, 854 F.2d 967, 971 (7th Cir. 1988). Had the threats actually been linked to the defendant in *Dudley*, they would have been admissible because "[such] threats tend to show guilty knowledge or an admission of guilt on the part of the defendant." *Cox v. State*, 422 N.E.2d 357, 360-63 (Ind. App. 1981) (quoted in *Dudley*, at 370). The Dudley court observed that such evidence could be extremely powerful - an evidentiary harpoon. *Id.*

Ms. Cary should have been allowed to harpoon Nequette's credibility, and derivatively that of his girlfriend, Debi Williams, who testified in agreement with him. With the evidence of threats against Saint Amour (and of rewards if the trial

turned out right), Ms. Cary could then have torpedoed the prosecution's case. Saint Amour should also have been allowed to explain to the jury, that based on later conversations he had with other company employees, who disagreed with Nequette as to company policies and practices, that he had lost confidence that the accounts he prepared were reliable indications as to what money, if any, Linda Cary had taken from the company (Nequette Drilling) without authorization.

The attorney general argues that the trial court has a lot of discretion to exclude evidence, and that the trial court did not abuse that discretion by disallowing impeachment evidence and evidence as to the untruthfulness of Nequette. Judicial discretion must yield to the Sixth Amendment right of confrontation and to the due process guarantees of a fair trial. The Supreme Court has held that denying such impeachment evidence is reversible error : *"to make any such inquiry [into the bias of the witness] effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness. Petitioner was thus denied the right of effective cross-examination which would be constitutional error of the first magnitude and no*

amount of showing of want of prejudice would cure it." Davis, 415 U.S. at 318 (internal quotations omitted).

The trial court had no authority to limit proper attacks on Nequette's credibility: "No obligation is imposed on the court, such as that suggested below, to protect a witness from being discredited on cross-examination, short of an attempted invasion of his constitutional protection from self incrimination, properly invoked. There is a duty to protect him from questions which go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate him." *Alford v. United States*, 282 U.S. 687, 694 (1931). The challenges to Nequette's credibility were all within proper bounds.

For the Sixth Amendment-based reasons offered above, the court erroneously excluded the testimony of Jennie Moore, who would have testified that, based on her knowledge and in her opinion, Dave Nequette was not a truthful person. The attorney general argues that Moore's testimony that Nequette was an untruthful person was an improper attempt to bolster the testimony of Moore. Answer Brief at 16. But, of course, attacking the credibility of one witness will often have the effect of strengthening the credibility of someone else. That is no reason to exclude evidence of untruthfulness of the key prosecution witness.

He also argues that if this were error, any error was harmless. But the attorney general overlooks that this is error of constitutional magnitude because this evidence was important to the attack on Nequette's credibility (Sixth Amendment right of confrontation) and to the presentation of the defendant's defense (due process right to present a defense). It is not subject to harmless error analysis.

The trial court ruled to exclude perfectly proper character evidence, despite the fact that there is a rule of evidence which expressly permits it. CRE 608(a). The attorney general spends a lot of words arguing through obfuscation that the trial court's ruling should be affirmed or, at the least, found to be harmless. The argument is frivolous.

Concerning the evidence of prior bad acts introduced against Ms. Cary, the attorney general has overlooked Ms. Cary's argument: ***the conduct at issue in the trial must be part of a single scheme of which the earlier wrongful acts are evidence***. *Hock* at 1250 (emphasis added, see Opening Brief at). "The allegations of fraudulent misstatements made on the application form to Mutual Benefit and the claim form to Royal Globe do not suggest an intent or plan by Abdelsamed to fraudulently obtain disability benefits from NYL by exaggerating his income or

concealing his other insurance coverage." *Id.* at 1251. The prior insurance transactions involved different insurers with different requirements for disclosure on the applications, thus the evidence was properly excluded. *Id.*

The Supreme Court found that the trial court acted correctly when it also excluded the "other acts" evidence under CRE 403 on the grounds that, even if such evidence were relevant, such an inquiry "would interject undue confusion and would create a collateral issue [to be tried]." *Id.*, at 1251. The *Hock* court further explained the dangers of creating a trial within a trial. *Hock v. New York Life Insurance Co.*, 876 P.2d 1242, 1251 (Colo. 1994)(internal citations omitted).

Whatever Ms. Cary was involved with, or not, in Arizona, it was not part of a single scheme with her employment as a bookkeeper at Nequette drilling. "Retrying" that Arizona case would have caused even worse confusion for the jury and prejudice for Ms. Cary, so she chose not to do so. But Ms. Cary was severely prejudiced by the improper admission of evidence regarding the Arizona civil case.

CONCLUSION

Ms. Cary was denied the right to confront her accusers, due process, and a fair trial and is, therefore, entitled to a new trial.

Respectfully submitted,

Paul Grant
Counsel for Ms. Cary

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the REPLY BRIEF on this 17th day of July, 2006, by placing the same into the United States Mail, postage paid (or as otherwise indicated) and addressed to:

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