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JUN 23, 2016
Court of Appeals
Division III
State of Washington

No. 32927-5-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

TRAVIS L. PADGETT,

Appellant.

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

REPLY BRIEF

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A. REPLY ARGUMENT

1. The State conflates the two counts when responding to Mr. Padgett's arguments on the two drug charges that Mr. Padgett argues were unsupported by sufficient evidence.

The Respondent, in addressing the issues of sufficiency of the evidence whether the substance provided by Mr. Padgett to H.M. was methamphetamine, and whether the methamphetamine in K.S.'s system was provided to her by Mr. Padgett, confusingly discusses the evidence at trial pertaining to the two arguments, compounding evidence together. Brief of Respondent, at pp. 22-24.

In response to the arguments on Count 8 and Count 9, the State aggregates the evidence. It is true that H.M. testified in some detail about the taste, appearance, and effects of the substance provided by Mr. Padgett, but there was absolutely no evidence that he had any special expertise in authoritatively recognizing the effects of the drug, no one with any such expertise testified, and no drugs or paraphernalia were found in Mr. Padgett's house in the search after his arrest. Mr. Padgett was totally surprised by the arrest, so presumably he had no motive to hide any substances. 10/14/13 RP 632.

The narrow question as to the H.M. issue on appeal is whether he was given methamphetamine. Lay claims by H.M. describing certain feelings he experienced after ingesting some matter, are entirely inadequate. There was no adequate set of Colquitt factors satisfied in this case, where the witness was not a person, such as a Drug Recognition Officer, or even a police officer familiar with substances. See State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006); Appellant's Opening Brief, at pp. 20-23.

Regarding Count 9, the initial issue as to K.S. on appeal is whether the methamphetamine, if so proved, was given to her by Mr. Padgett. Of course, the drug test administered upon K.S. was not a business record. See infra.

Regarding K.S., there was nothing other than her inadequate testimony to tie her particular ingestion of the drug to Mr. Padgett. It is not enough that the complainant K.S. hoped that Mr. Padgett would have methamphetamine, and that she smoked methamphetamine with the defendant. This does not prove that he provided the methamphetamine to her – a fact that would have been adduced if accurate. Appellant's Opening Brief, at pp. 23-25.

The Respondent's citation to In re PRP of Delmarter, 124 Wn. App. 154, 163, 101 P.3d 11 (2004) is inapposite, given that defendant in that case admitted the substances in question were cocaine and heroin as alleged. See Brief of Respondent, at p. 23.

2. The hearsay rule was violated.

The Brief of Respondent, addressing the issue whether the doctor's statements regarding claimed drug testing results were admissible under the business records exception to the hearsay rule, relies on State v. Garrett, 76 Wn. App. 719, 887 P.2d 488 (1995); see Brief of Respondent, at pp. 25-26. This case was relied on by the trial court, and distinguished in the Opening Brief. Appellant's Opening Brief, at pp. 28-31. Respondent impliedly asserts, in this argument and in discussing the evidentiary sufficiency issues, that the doctor who received the test results was intimately familiar with the test procedure. Brief of Respondent, at p. 20. However, as summarized in the Opening Brief, Dr. Rivas' testimony and his "knowledge" of test procedures was very vague. Appellant's Opening Brief, at pp. 26-27 and 30-31;

10/21/13RP 1190-91.

The Respondent does not address State v. Nation, 110 Wn. App. 651, 656, 41 P.3d 1204 (2002). In that case, the Court reversed

because, as here, the particular technician/tester's report was not admitted into evidence, the collector and submitter of the sample was not identified, and – most significantly – the testifying witness's, Dr. Rivas', testimony as to the nature of the substance was entirely based on the hearsay. See Appellant's Opening Brief, at pp. 29-30.

Importantly, the business record exception to the hearsay bar is strictly construed. State v. Finkley, 6 Wn. App. 278, 280, 492 P.2d 222 (1972). Here, the requirements of this exception were not made out, and the trial court abused its discretion.

Mr. Padgett relies on his Appellant's Opening Brief for the argument that admission of the hearsay violated his confrontation clause rights.

3. The prosecutor's closing argument is not the law and does not cure the Double Jeopardy error in the jury instructions.

Ultimately, Mr. Padgett's jury was not instructed that each conviction must be predicated on a separate and distinct act and that proof of one act cannot support a finding of guilt on more than one count. Under State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007), where there are multiple identically charged offenses, this entire language is required to protect against Double Jeopardy.

It is of course the Respondent's argument that there was no double jeopardy violation as a result of the error in the to-convict instructions. Brief of Respondent, at p. 29. The Respondent incorrectly argues that the missing language in the to-convict instructions' "separate and distinct" language (that missing language being that "the separate and distinct act cannot support more than one count") would be redundant to the other separate and distinct language that was in the instructions. But this contention is squarely contrary to Borsheim. Borsheim, 140 Wn. App. at 366.

Respondent contends that the error in the jury instructions was also somehow negated by the fact that, in closing argument, the State made an "election" of a specific act for each count. Brief of Respondent, at p. 31. However, the State does not explain how an election, which is for purposes of ensuring jury unanimity under State v. Petrich, cures a double jeopardy violation in the jury instructions. See State v. Petrich, 101 Wn.2d 566, 570, 683 P.2d 173 (1984).

Mr. Padgett also relies on Mutch, as argued in the Opening Brief. Appellant's Opening Brief, at pp. 36, 38-39 (citing State v. Mutch, 171 Wn.2d 646, 661, 254 P.3d 803 (2011)). That case makes clear that it is only the "rare" case where it can be said that, despite the

Double Jeopardy error in the instructions, it was “manifestly apparent” to the jury that each count could only be supported by an act separate and distinct from any and all other acts used to support the other count(s).

Notably, the Respondent erroneously states the charging period for Count 14; the charging period for this count of child molestation in the third degree was actually August 1, 2012 only. This was the only count subject to a jury inquiry and is the count where the jury returned a verdict of not guilty, which demonstrates the difference in the outcome of the counts as likely a result of the inadequate Double Jeopardy language. See Appellant’s Opening Brief, at pp. 39-40.

Finally, the Respondent’s citation to State v. Chenoweth, 185 Wn. 2d 218, 370 P.3d 6 (2016), is inapposite. Brief of Respondent, at p. 32. This case involves a sentencing issue of same criminal conduct, not Double Jeopardy.

4. There cannot be harmless beyond a reasonable doubt where the evidence, even if it were to be construed in the State’s favor, shows only 5 months of sexual abuse.

The State concedes the error that the trial court’s instruction regarding the “prolonged period of time” aggravating factor was a

comment on the evidence. Brief of Respondent, at p. 32; see State v. Brush, 183 Wn.2d 550, 557, 353 P.3d 213 (2015). The Respondent contends that the error was harmless because the alleged abuse in the present case occurred over a five month period. But Brush cited to State v. Barnett, 104 Wn. App. 191, 16 P.3d 74 (2001), and other cases that suggest a prolonged period of time exceeds a year. Brush, at 558. Crucially, the issue is not whether this period of months might be sufficient. Rather, reversal is required because it cannot be said beyond a reasonable doubt that a jury, without the court's comment on the evidence, would deem five months to be a prolonged period of time.

5. The State did not prove all the alternative means of the aggravating factors.

Relatedly, the State did not prove with substantial evidence all the alternative means of the aggravating factors that were applied to Counts 1 through 6, which are sexual, psychological, and physical abuse. Therefore, the exceptional sentence suffers from a lack of substantial evidence on the means.

The Respondent, at p. 33 of its briefing addressing the absence of substantial evidence on all of the alternative means of the aggravating factor of aggravated domestic violence by physical,

psychological, or sexual abuse, argues that sexual abuse encompasses the other two means of the aggravator. This contention is squarely contrary to basic rules of statutory construction. Where the Legislature has used different terms, it is presumed to intend those terms to have different meanings. State v. Roggenkamp, 153 Wn.2d 614, 625, 106 P.3d 196 (2005). Yet the State presented no evidence of any physical or psychological abuse. The exceptional terms must be reversed.

6. The court failed to consider whether Mr. Padgett had the ability to pay legal financial obligations.

Regarding the defendant's challenge to the Legal Financial Obligations, the State argues that Mr. Padgett is precluded from raising this issue for the first time on appeal. Brief of Respondent, at p. 34. But the case of State v. Blazina, 182 Wn.2d 827, 835, 344 P.3d 680 (2015), makes clear that this Court can exercise its discretion to reach the merits of the issue on appeal. Furthermore, the trial court is required to comply with the sentencing statutes. RCW 10.01.160(3) provides that the court shall make a determination of the ability to pay by taking into account the financial resources of the defendant and the nature of the burden that costs will impose on him. See State v. Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011). The record

shows that the court did not comply with this dictate, yet entered a boilerplate finding. CP 471.

7. Error in the judgment and sentence and warrant of commitment.

The State's brief concedes error in the judgment and sentence documents, Brief of Respondent, at p. 35, but neglects to specifically address the error in the warrant of commitment that includes count 14, even though Mr. Padgett was acquitted of that count. The judgment must be corrected.

B. CONCLUSION

Based on the foregoing and on his Opening Brief, the appellant, Mr. Padgett, requests that this Court of Appeals reverse his convictions.

DATED this 23rd day of June, 2016.

Respectfully submitted,

s/ OLIVER R. DAVIS.

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF JUNE, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 23RD DAY OF JUNE, 2016.

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