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Court of Appeals
Division III
State of Washington

No. 34035-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Carrie Aenk,

Appellant.

Spokane County Superior Court Cause No. 15-1-00347-1

The Honorable Judge James Triplet

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The court violated Ms. Aenk's Sixth and Fourteenth Amendment right to present a defense by prohibiting her from introducing critical evidence.
2. The court violated Ms. Aenk's right to present a defense under Wash. Const. art. I, §§ 3 and 22 by prohibiting her from introducing critical evidence.
3. The court violated Ms. Aenk's right to present a defense by precluding her from presenting testimony that the Hatfields told her to use the check as the second payment for the adoption of horses Quinn and Baron.

ISSUE 1: An accused person has a constitutional right to present relevant, admissible evidence necessary to the defense. Did the court violate Ms. Aenk's right to present a defense by precluding her from introducing evidence that the Hatfields told her to use the check for their second payment for the adoption of Quinn and Baron?

4. Ms. Aenk's conviction for third-degree theft violated her Fourteenth Amendment right to due process because it was based on insufficient evidence.
5. The state failed to prove that Ms. Aenk obtained money from the Hatfields by color or aid of deception.

ISSUE 2: Conviction for third-degree theft requires proof that the accused person obtained control over property by color or aid of deception. Did the state fail to prove that Ms. Aenk obtained the adoption fee for Duke by color or aid of deception?

6. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

ISSUE 3: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Ms. Aenk is indigent, as noted in the Order of Indigency?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Carrie and Allan Aenk loved animals, and ran a horse and dog rescue. RP¹ 341, 342. They took in abandoned and neglected animals and brought them back to health. RP 341-343. Since 2003, the couple operated a charity “Shephard’s Way”, which rehabilitated and then adopted out some of the rescued animals. RP 343, 413, 485.

They used an adoption contract that contained provisions requiring approval of the location the animals were to be kept and setting out that the fee was for adoption and expenses and was not refundable. Ex. 6, 7, 8; RP 347, 349, 421-423. Rehabilitating horses and dogs was an expensive and work-intensive project, and the fees were made nonrefundable to allow the continued work of the charity. RP 349-350.

In the summer of 2013, Elle Hatfield wanted horses. RP 128. Her family had recently bought property and wished to keep horses there, though the property was not fenced, had no power or water and was in several other ways not horse-ready. She contacted Shepard’s Way and asked about horses. RP 128-129, 220, 344, 436.

One of the horses at the rescue was named Duke. The horse was older but Mrs. Hatfield wanted him for her grown daughter. RP 129-132,

¹ Citations in this brief are to the trial transcripts which are consecutively numbered and start on October 12, 2015.

436-438. Mrs. Hatfield agreed with Mrs. Aenk on an adoption fee of \$500 for Duke. RP 346, 439. When she was at the Aenk property to introduce her daughter to the horse, she saw two other horses and expressed interest in adopting them. These horses were named Baron and Quinn. RP 129, 137-138.

Mrs. Hatfield and Mrs. Aenk negotiated over the adoption fee for Quinn and Barren. RP 138-143, 223, 351-352. They agreed on \$5000, though the Hatfields would later hotly dispute this. RP 141, 173-174, 223, 352. Mrs. Hatfield wrote a check to Mrs. Aenk for \$2500, and they agreed that the other half owed would be paid when the horses were delivered. RP 353.

Elle Hatfield had described a pasture next to her home for the horses. RP 347, 444. She and Mrs. Aenk signed an adoption contract for Duke and Elle Hatfield gave Mrs. Aenk a check for \$500. RP 132, 134-135. The parties had not set a delivery date.² RP 349. Mrs. Aenk cashed the check. RP 100-101.

Carrie Aenk and later also her husband went to the property where the horses were to be kept. RP 153, 354. It was not as they expected, as it had no fence, no water or power source, and no shelter for the animals.

² The Hatfields would later claim that they made an agreement with the Aenks that the check for Duke would not be cashed until the horse was delivered. The Aenks contested this. RP 349.

The Hatfields did not reside there. It was instead on top of a mountain which could get several feet of snow in the winter, up a switch-backed gravel road, and contained ditches and other hazards for horses. RP 354-356, 360-361, 444, 449-450.

Allan Aenk saw the beginnings of a fence system that would be totally inadequate for horses and he tried to help the Hatfields find and install a proper fence. RP 156, 229, 357, 404, 449. Mr. Aenk went the property and tried to assist several times. RP 228, 358-359, 399-400, 407-408.

The parties signed contracts for the adoption of Baron and Quinn, and Mrs. Hatfield gave Mrs. Aenk a check. Ex. 7, 8. Mrs. Aenk took the check for \$2500 to the bank on which it was drawn, but their computers were down and they did not cash it. RP 367, 415, 454. Mr. Aenk called the Hatfields and asked them for cash instead. RP 368. The Hatfields agreed and gave Mrs. Aenk \$2500 in cash. RP 99, 154-155, 230-231, 369, 455. Mrs. Aenk tried to return the check to them, but Dustin Hatfield told her to keep it as their second payment.³ RP 458.

Many of the suggestions made by the Aenks to make the property suitable for horses were not completed. RP 362, 457. Even after Mr. Aenk and his ranch hand helped a few days, the fence was still not

³ Dustin and Elle Hatfield would later deny this. RP 154-155, 547.

completed.⁴ RP 394, 397. There was still no water supply. RP 394. The Aenks declined to deliver the horses at the time previously agreed. RP 393-396, 498. The relationship between the Hatfields and the Aenks deteriorated. RP 158, 161-162, 179-180, 235

Mrs. Aenk took the \$2500 check to a check-cashing shop where she could easily check to see if it would be honored. RP 408-411, 430, 459. She provided Mr. Hatfield's number to the clerk, who called him. RP 412, 461-462. Mr. Hatfield told the clerk that the check should not be cashed, and then called his bank and put a stop payment order on the check. RP 237.

Even after this, the parties continued to communicate to try to agree on a time and place for the delivery of the horses. RP 477, 507-508. In the end, the horses were not adopted by the Hatfields. RP 516.

The state charged Mrs. Aenk with attempted theft two for attempting to cash the check for \$2500 at the check-cashing shop, and with theft three for the \$500 check that Mrs. Aenk cashed for the adoption of Duke. CP 1-2.

The trial centered on the dispute between the Aenks and the Hatfields about what the written contract meant, and what other agreements were made between them. Both Elle and Dustin Hatfield

⁴ In fact, some of the fence was torn down. RP 429.

acknowledged that the contract clearly indicated that the adoption fee was non-refundable. RP 167-169, 176-177, 182, 226, 242, 257.

During Allan Aenk's testimony, the defense asked him about discussions the Aenks had with the Hatfields about when the horses would be delivered. RP 374-375. The state's hearsay objection was sustained. RP 374-392. Mrs. Aenk's defense attorney argued that the information was not hearsay since it was part of an oral agreement between the parties. RP 375-392. The defense attorney further declined the state's suggestion that it could argue that it was impeachment of the Hatfields with a prior inconsistent statement. RP 384-392.

The jury convicted Mrs. Aenk. CP 96-97.

The piece of evidence that the jury never heard was both Aenks's testimony that Dustin Hatfield had told them to keep the check for \$2500 as the second payment. The defense moved for a new trial after the guilty verdicts, but the court denied it. RP 605-626; CP 98-101.

Carrie Aenk timely appealed. CP 197.

ARGUMENT

I. THE COURT VIOLATED MS. AENK'S RIGHT TO PRESENT A DEFENSE BY PROHIBITING HER FROM INTRODUCING CRITICAL EVIDENCE.

An accused person has a constitutional right to present a defense. U.S. Const. Amends. VI, XIV; art. I, §§3, 22; *State v. Jones*, 168 Wn.2d

713, 720, 230 P.3d 576 (2010); *State v. Franklin*, 180 Wn.2d 371, 378, 325 P.3d 159 (2014) (citing *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973) and *Holmes v. S. Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)). The right to present a defense includes the right to introduce relevant⁵ and admissible evidence. *Jones*, 168 Wn.2d at 720. Violation of the constitutional right creates manifest error that can be raised for the first time on appeal. RAP 2.5(a)(3).⁶

Once the accused has established that proffered evidence is relevant and admissible, it can only be excluded if the state proves that it is “so prejudicial as to disrupt the fairness of the fact-finding process at trial.” *Id.* No state interest is compelling enough to prevent evidence that is of high probative value to the defense. *Id.*

Here, Ms. Aenk sought to introduce testimony that Dustin told her to keep the check and to use it as the second payment for the adoption of Quinn and Baron. CP 98-101. Dustin’s statement explained why Ms. Aenk did not destroy the check when Dustin gave her cash. She did not

⁵ Evidence is relevant if it has any tendency to prove a material fact. ER 401. The threshold to admit relevant evidence is low; even minimally relevant evidence is admissible. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010).

⁶ Defense counsel strenuously argued for admission of the evidence at issue here. RP 375-392. However, he did not cite the constitutional right to present a defense. Even so, the error may be raised. RAP 2.5(a)(3).

offer the evidence for its truth, but rather for its effect on her. RP 375-392, 614; CP 98-101.

Because it was not offered for its truth, the testimony was not hearsay. ER 801. The trial judge should have admitted the evidence.

Without the evidence, the jury could not understand why Ms. Aenk believed she was entitled to the funds when she went to verify that the check was valid. No state interest could have been compelling enough to preclude the admission of the highly probative evidence, which was necessary for Ms. Aenk's defense. *Jones*, 168 Wn.2d at 720. Accordingly, the exclusion of the evidence violated Ms. Aenk's right to present a defense under the Sixth and Fourteenth Amendments and art. I, §§ 3, 22.

Violation of the right to present a defense requires reversal unless the state can establish harmlessness beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 382. The state cannot demonstrate that the violation here was harmless beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 382. Ms. Aenk's entire defense rested on her belief that she was entitled to the money and that she had permission to cash the check upon delivery of the horses. RP 608-617. In closing, counsel was unable to explain why she believed she had permission to retain and cash the check. RP 571-582.

The state cannot prove beyond a reasonable doubt that “any reasonable jury would have reached the same result without the error.” *Jones* 168 Wn.2d at 724. Ms. Aenk’s convictions must be reversed. *Id.*

II. THE EVIDENCE WAS INSUFFICIENT TO CONVICT MS. AENK OF THIRD-DEGREE THEFT.

To obtain a conviction for third-degree theft, the state was required to prove that Ms. Aenk obtained control over property of another “by color or aid of deception,” and acted with intent to deprive the owner. CP 91; *see* RCW 9A.56.020(1)(b).

There is no indication that Ms. Aenk deceived the Hatfields when she accepted payment of the non-refundable adoption fee. She has run Shepherds Way Animal Rescue for 10 years. RP 343, 413, 485. Her written contract makes clear that the fee is nonrefundable. Ex 6, 7, 8. The parties understood that the horses would not be delivered until the Hatfields’ property had passed an inspection. Ex. 6, 7, 8; RP 347, 349, 421-423. Ms. Aenk and her husband went to the property more than once to conduct the inspection, and Mr. Aenk actually helped the Hatfields with their fencing. RP 228, 358-359, 394, 397, 399-400, 407-408.

Elle Hatfield canceled the contract prior to the scheduled date Duke was to be delivered. Ex. 14, Supp. CP. Although she demanded a

full refund, she did not claim ignorance of the contract's terms. Ex. 14, Supp. CP.

Under these circumstances, the state failed to prove beyond a reasonable doubt that Ms. Aenk wrongfully obtained property by color or aid of deception. The conviction for third-degree theft must be reversed and the charge dismissed with prejudice. *State v. Mau*, 178 Wn.2d 308, 317, 308 P.3d 629 (2013).

III. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016).⁷

Appellate costs are “indisputably” discretionary in nature. *Id.*, at 388. The concerns identified by the Supreme Court in *Blazina* apply with

⁷ Division II's commissioner has indicated that Division II will follow *Sinclair*.

equal force to this court's discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court found Ms. Aenk indigent. CP 195-196. There is no reason to believe that status will change. The *Blazina* court indicated that courts should "seriously question" the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

For the foregoing reasons, Ms. Aenk's convictions must be reversed. Count I must be remanded for a new trial; Count II must be dismissed with prejudice.

Respectfully submitted on June 28, 2016,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

A handwritten signature in blue ink that reads "Manek R. Mistry". The signature is fluid and cursive, with the first name "Manek" and last name "Mistry" clearly legible.

Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Carrie Aenk
4819 F Springdale Hunters Road
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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Spokane County Prosecuting Attorney
SCPAappeals@spokanecounty.org

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 28, 2016.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant