

No. 43172-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Rex Pope,

Appellant.

Kitsap County Superior Court Cause No. 11-1-00729-2

The Honorable Judge Leila Mills

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Pope's convictions were entered in violation of his Sixth and Fourteenth Amendment right to present his defense.
2. The trial court erred by denying Mr. Pope's motion for a continuance so his attorney could obtain medical records and consult with experts regarding Mr. Pope's Parkinson's disease.
3. The trial judge improperly commented on matters of fact, in violation of Wash. Const. Article IV, Section 16.
4. The trial court commented on matters of fact by instructing jurors to disregard Mr. Pope's physical symptoms, which were visible to them throughout trial.
5. The trial court erred by giving Instruction No. 13.
6. The court's instruction defining "substantial step" impermissibly relieved the state of its burden of establishing every element of attempted vehicle theft.
7. The court's instructions on attempted theft failed to make the relevant legal standard manifestly clear to the average juror.
8. Mr. Pope was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
9. Defense counsel failed to investigate Mr. Pope's medical condition and its impact on his ability to give someone a bloody nose.
10. Defense counsel failed to assist Mr. Pope in making an informed decision whether to plead guilty or proceed to trial.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The constitution guarantees an accused person a meaningful opportunity to present his or her defense. Here, the trial judge refused Mr. Pope's request for a continuance to allow his attorney to obtain medical records, consult with experts, and secure the attendance of witnesses at trial. Did the trial judge

violate Mr. Pope's Sixth and Fourteenth Amendment rights to due process and to present a defense by unreasonably denying his request for a continuance?

2. A trial judge is absolutely prohibited from commenting on matters of fact, and any judicial comment is presumed to be prejudicial. In this case, the judge instructed jurors to disregard visible symptoms of Mr. Pope's illness. Did the trial judge's comment violate Mr. Pope's rights under Article IV, Section 16?
3. A conviction for attempt requires proof that the accused person took a "substantial step" toward commission of the crime charged; the phrase "substantial step" means "conduct strongly corroborative of the actor's criminal purpose..." Here, the court's instructions defined the phrase as "conduct that strongly indicates a criminal purpose..." Did the instruction relieve the prosecution of its burden to prove the elements of attempted theft beyond a reasonable doubt, in violation of Mr. Pope's Fourteenth Amendment right to due process?
4. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. In this case, defense counsel failed to adequately investigate a potential defense prior to Mr. Pope's trial. Was Mr. Pope denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Forty-six-year-old Rex Pope suffers from Parkinson's disease. He experiences pain, seizures, and muscle spasms; his movements are jerky and stiff, he has uncontrollable tremors, and his balance is unstable. These symptoms are most severe on his right side. Motion for New Trial (Exhibits A3, A9, A13), Supp. CP. In addition, he walks with what is referred to as a "Parkinsonian gait." Motion for New Trial (Exhibit A9), Supp. CP.

In September of 2011, he was charged with second-degree assault and attempted theft of a motor vehicle. CP 1-4.¹ The prosecution alleged that he had punched a man named Laverne Hallsted while trying to steal his pick-up truck. CP 1-4. Trial was set for November 8, 2011. Minutes (9/12/11), Supp. CP.

Mr. Pope asked his attorney to obtain medical records and expert testimony regarding his physical abilities, with the goal of showing the jury that he could not have inflicted injuries and escaped in the manner alleged by Mr. Hallsted. RP (12/6/11 am) 4; RP (12/6/11 pm) 12. At a

¹ The state also alleged an aggravating factor of rapid recidivism on each offense. CP 1-4.

“trial call” on November 8, the court granted a continuance to December 6th. Minutes (11/8/11), Supp. CP; see also RP (12/6/11 am) 2.

By December 6th, defense counsel had still not been able to obtain medical records or speak with Mr. Pope’s medical providers. He again asked that the trial be continued. The court denied this request, and the trial began that day with argument and rulings on preliminary matters. RP (12/6/11 am) 2-6; RP (12/6/11 pm) 4-9, 13-46.

From the outset, Mr. Pope planned not to testify in his own defense. RP (12/6/11 pm) 32-33. A major reason for this decision related to his symptoms: Mr. Pope shakes visibly and uncontrollably, and stress enhances the symptoms of Parkinson’s.² RP (12/6/11 pm) 14, 32-34. Mr. Pope wanted his attorney to provide information about Parkinson’s disease to the jury for their consideration. Since his attorney hadn’t secured the testimony of any of Mr. Pope’s medical care providers, Mr. Pope brought a printout about the disease from the website of the Mayo Clinic. RP (12/6/11 pm) 32; Proposed Exhibit 8, Supp. CP. The state objected, and the court ruled the printout inadmissible. RP (12/6/11 pm) 32-43.

After these rulings, and in order to address Mr. Pope’s visible shaking during trial, defense counsel asked that his client’s symptoms be

² In addition, Mr. Pope has several convictions that may have been admitted in cross-examination.

explained to the jury. RP (12/6/11 pm) 40-43. The prosecutor agreed, but said he “would also like for the jury to be instructed that they should know this, but that fact is not evidence to be used by them in deliberations.” RP (12/6/11 pm) 41. He wanted the court to tell jurors “that the fact that he suffers from Parkinson's is not evidence to be used by you in your deliberations.” RP (12/6/11 pm) 42. The judge proposed the following language:

At Mr. Pope's request, I would like to inform you that he suffers from Parkinson's disease. This is not a fact in the case, but he has requested that this be conveyed to you so as to explain his visible symptoms of shaking.
RP (12/6/11 pm) 43.

Neither party objected.

Mr. Pope personally addressed the court the following morning, just before the start of voir dire. He asked the court to again consider providing jurors the information contained in his printout from the Mayo Clinic. RP (12/7/11 voir dire) 4-6. He expressed his concern about the “grave [injustice]” that might occur if jurors were not so informed. He also declared his attorney ineffective and again requested the trial be continued. RP (12/7/11 voir dire) 4-7. The court refused to consider the motion, and directed Mr. Pope to speak to his attorney. RP (12/7/11 voir dire) 7. During voir dire, jurors were instructed that Mr. Pope had

Parkinson's disease, but that this was "not a fact in the case." RP (12/7/11 voir dire) 10.

At trial, Laverne Hallsted testified when he went to his pick-up truck after work, he saw a man lying across the seat with his feet sticking out the open passenger door. RP (12/8/11) 95, 98. The man was using a short stick to hit at the ignition cover. RP (12/8/11) 99, 123. Hallsted addressed the man, who got up. RP (12/8/11) 99. According to Hallsted, the man punched him in the cheek with his right hand. RP (12/8/11) 99. Hallsted described the assault as a "hard" punch. RP (12/8/11) 114.

The two men struggled, and Hallsted tried to cut open the other man's cheek with his keys. RP (12/8/11) 101-102, 131. During the struggle, the man's bag opened and items fell onto the ground. RP (12/8/11)103. The man broke free and ran away. RP (12/8/11) 104-105.

Hallsted testified that he was a strong and healthy 57-year-old-man, that he often rides his bike to and from his job, and that he had recently finished not only the STP³ but also RAMROD,⁴ an extremely strenuous ride. RP (12/8/11) 100, 114, 128. He told the jury that while fleeing, the man ran "faster than I do". RP (12/8/11) 114.

³ The Seattle To Portland ride.

⁴ Ride Around Mount Rainier In One Day.

One of the items on the ground was a blister pack of medication with the name “Rex Pope” on it. RP (12/8/11) 109, 142-143. From a photo montage, Hallsted identified Mr. Pope as the man who had hit him. RP (12/8/11) 113, 150-154.

Once the evidence at trial had been concluded, the judge gave the jury the following instruction regarding attempt:

A substantial step is conduct which strongly indicates a criminal purpose and which is more than mere preparation.
Instr. No. 13, Court’s Instructions, Supp. CP.

The jury convicted Mr. Pope as charged.⁵ CP 5.

After trial, Mr. Pope sought a new attorney, arguing that defense counsel had not sufficiently investigated his defense or presented his case. Motion for Withdrawal and Substitution, Motion to Discharge Attorney, Supp. CP. The court allowed the withdrawal and assigned a new attorney. RP (1/13/12) 3-12. Later, at Mr. Pope’s request, the court allowed him to represent himself. RP (2/24/12) 26-29.

Mr. Pope filed a motion for a new trial. Motion for New Trial, State’s Response to CrR 7.5 Motion, Supp. CP. The motion was denied. RP (3/2/12) 32-45. He then filed a Motion for Reconsideration. See

⁵ The jury also returned “Yes” verdicts on the aggravators.

Motion for Reconsideration with Index, Motion for Reconsideration with Supporting Documents, Supp. CP. No action was taken on this motion.

At sentencing, the court declined to impose an aggravated sentence, and sentenced Mr. Pope within his agreed standard range. CP 5-15. Mr. Pope timely appealed. CP 16.

ARGUMENT

I. MR. POPE WAS DENIED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

A. Standard of Review

A trial court's ruling denying a motion for continuance is ordinarily reviewed for an abuse of discretion;⁶ however, this discretion is subject to the requirements of the constitution. See, e.g., *State v. Iniguez*, 167 Wash.2d 273, 280-81, 217 P.3d 768 (2009). Accordingly, where the appellant makes a constitutional argument regarding the denial of a continuance, review is de novo. *Id.*

Constitutional error is presumed to be prejudicial, and the state bears the burden of proving harmlessness beyond a reasonable doubt.

⁶ A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wash.2d 842, 858, 204 P.3d 217 (2009). This includes reliance on unsupported facts, application of the wrong legal standard, or taking an erroneous view of the law. *State v. Hudson*, 150 Wash.App. 646, 652, 208 P.3d 1236 (2009).

State v. Watt, 160 Wash.2d 626, 635, 160 P.3d 640 (2007). Constitutional error is harmless only if it is “trivial, or formal, or merely academic, and [is] not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” State v. Koslowski, 166 Wash. 2d 409, 433, 209 P.3d 479 (2009) (Sanders, J., concurring) (quoting State v. Britton, 27 Wash.2d 336, 341, 178 P.2d 341 (1947)); see also City of Bellevue v. Lorang, 140 Wash.2d 19, 32, 992 P.2d 496 (2000). The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. State v. Burke, 163 Wash.2d 204, 222, 181 P.3d 1 (2008).

B. Under the Fourteenth Amendment’s due process clause, Mr. Pope was guaranteed a meaningful opportunity to present his defense.

A state may not “deprive any person of life, liberty, or property, without due process of law...” U.S. Const. Amend. XIV. The due process clause (along with the Sixth Amendment right to compulsory process) guarantees criminal defendants a meaningful opportunity to present a complete defense. Holmes v. South Carolina, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). An accused person must be allowed to present his version of the facts so that the fact-finder may decide where the truth lies. State v. Maupin, 128 Wash.2d 918, 924, 913

P.2d 808 (1996) *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

Trial continuances are governed by CrR 3.3. Under that rule, the court “may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense.” CrR 3.3(f)(2). Failure to grant a continuance may deprive a defendant of a fair trial. *State v. Purdom*, 106 Wash.2d 745, 725 P.2d 622 (1986); see also *United States v. Flynt*, 756 F.2d 1352 (9th Cir. 1985). Furthermore,

While efficient and expeditious administration is, of course, a most worth-while objective, the defendant’s rights must not be overlooked in the process through overemphasis upon efficiency and conservation of the time of the court.

State v. Watson, 69 Wash.2d 645, 651, 419 P.2d 789 (1966).⁷

Factors relevant to the trial court’s decision on a continuance motion include the moving party’s diligence, due process considerations, the need for orderly procedure, the possible impact on the trial, whether prior continuances have been granted, and whether the purpose of the

⁷ See also *State v. Oughton*, 26 Wash. App. 74, 612 P.2d 812 (1980); *State v. Hoggatt*, 38 Wash. 2d 932, 234 P.2d 495 (1951).

motion was to delay the proceedings. *State v. Bonisisio*, 92 Wash.App. 783, 964 P.2d 1222 (1998).

For example, in *Flynt*, the defendant sought a continuance to enable him to consult with a psychiatrist in anticipation of presenting a diminished capacity defense to a contempt charge. *Flynt*, at 1356. The trial court refused the request, and the case proceeded to hearing without expert testimony. *Flynt*, at 1356-1357. The 9th Circuit Court of Appeals reversed the convictions, finding that

Flynt's only defense... was that he lacked the requisite mental capacity. The district court's denial of a continuance... effectively foreclosed *Flynt* from presenting that defense.

Flynt, at 1358.

C. The trial court infringed Mr. Pope's constitutional right to present a defense by denying his request for a continuance.

The trial court's refusal to grant a continuance prevented Mr. Pope from presenting evidence about his Parkinson's disease. The factors outlined above weighed in favor of granting the continuance; accordingly, the trial judge should have postponed the trial.

Diligence. The defense was diligent in its efforts to investigate Mr. Pope's defense.⁸ The first step in the investigation was to obtain Mr.

⁸ In the alternative, defense counsel failed to adequately investigate Mr. Pope's case, as outlined elsewhere in this brief.

Pope's medical records; counsel attempted to contact medical providers in advance of trial in order to acquire Mr. Pope's records.

Because the trial court denied Mr. Pope's continuance request, the trial concluded before the records were received by defense counsel.

Motion to Reconsider, Supp. CP. As can be seen, the records contained information that would have permitted defense counsel to consult with an expert—either one of Mr. Pope's treating physicians or an independent doctor—to testify about Mr. Pope's physical inability to punch someone with his right hand. Motion to Reconsider, Exhibits, Supp. CP.

Due process. Mr. Pope's planned defense hinged on undermining Hallsted's testimony. Hallstead claimed that his assailant punched him with his right hand with sufficient force to give him a bloody nose. RP (12/8/11) 99-100, 120, 131. Without testimony about the weakness in his right arm and the tremors from which he suffered, Mr. Pope was left unable to present his defense (except possibly through his own self-serving testimony).⁹ Accordingly, due process considerations supported the requested postponement.

Orderly procedure. Counsel's continuance request came during the "trial call" on December 6, 2011. Although the record does not

⁹ Mr. Pope elected not to testify because he was concerned that his tremors might be mistaken for nervousness stemming from a guilty conscience. RP (12/6/11 pm) 33.

contain an explanation of local procedure, a continuance requested by Mr. Pope during “trial call” a month earlier was granted. RP (12/6/11 am) 2. Jury selection did not commence until the following day.¹⁰ RP (12/7/11 voir dire) 8.

The prosecutor did not raise any specific objection to the continuance, or indicate that witnesses would be unavailable if the trial were to be postponed. Instead, the prosecution’s only specific comment was that Hallsted was “very interested in having this matter go to trial...” RP (12/6/11 am) 3.

Under these circumstances, Mr. Pope’s continuance request would not have unduly interfered with the need for orderly procedure.

Prior continuances. The trial date had been reset only one time, from November 8 to December 6. Minutes (11/8/11), Supp. CP.

Impact on trial. The evidence sought would have had a significant impact on the trial. If defense counsel had been granted the time to obtain Mr. Pope’s medical records and consult with an expert, he

¹⁰ In denying the continuance request, the trial judge did not make a record as to whether a jury panel had already been assigned to Mr. Pope’s trial, or if prospective jurors could be called off or diverted to another courtroom. RP (12/6/11 am) 2-6. Presumably such arrangements were possible, since Mr. Pope’s case was set over during the previous month’s “trial call” without apparent difficulty. RP (12/6/11 am) 2. The clerk’s minutes for December 6 indicate that the court “sends [Mr. Pope’s case] to trial today.” Minutes (12/6/11), Supp. CP. The clerk’s use of the active verb “sends” suggests that the court had to affirmatively direct that the trial commence. Similarly, the prosecutor indicated his preference that the case “go out.” RP (12/6/11 am) 3.

would have been able to present testimony undermining Hallsted's version of events. Because Hallsted provided the only evidence outlining the interaction between himself and Mr. Pope, his testimony was critical to the prosecution.

Furthermore, Mr. Pope's decision not to testify was impacted by the lack of medical evidence explaining his condition to the jury. RP (12/6/11 pm) 33. Had the continuance been granted and expert testimony secured, Mr. Pope may well have provided the jury with his version of events.

Effort to delay. There was no indication that the continuance was sought in order to delay the proceedings. Mr. Pope was anxious to have his medical condition placed before the jury so they could evaluate Hallsted's version of the conflict. RP (12/6/11 pm) 3-12, 32-43; RP (12/7/11 voir dire) 4-7.

Indeed, Mr. Pope himself addressed the court on the afternoon of December 6th, expressing his fear that the court's denial of a continuance "would be a grave [injustice]." RP (12/6/11 pm) 5.

Conclusion. The denial of the continuance prevented Mr. Pope from presenting his only possible defense to the charge, in violation of his rights under the Sixth and Fourteenth Amendments. As in *Flynt*, the trial court's decision prejudiced Mr. Pope. *Flynt*, at 1358. The error cannot be

described as trivial, formal, or merely academic. Accordingly, his conviction must be reversed and his case remanded for a new trial. Flynt, at 1358.

II. THE TRIAL JUDGE COMMENTED ON MATTERS OF FACT, IN VIOLATION OF WASH. CONST. ARTICLE IV, SECTION 16.

A. Standard of Review

Alleged constitutional violations are reviewed de novo. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011). A manifest error affecting a constitutional right may be raised for the first time on review.¹¹ RAP 2.5(a)(3); *State v. Kirwin*, 165 Wash.2d 818, 823, 203 P.3d 1044 (2009). A comment on the evidence “invades a fundamental right” and may be challenged for the first time on review under RAP 2.5(a)(3). *State v. Becker*, 132 Wash.2d 54, 64, 935 P.2d 1321 (1997).

A judicial comment is presumed prejudicial and is only harmless if the record affirmatively shows no prejudice could have resulted. *State v. Levy*, 156 Wash.2d 709, 725, 132 P.3d 1076 (2006). This is a higher standard than that normally applied to constitutional errors. *Id.*

¹¹ The court may also accept review of other issues argued for the first time on appeal, including constitutional errors that are not manifest. RAP 2.5(a); see *State v. Russell*, 171 Wash.2d 118, 122, 249 P.3d 604 (2011).

- B. The trial judge improperly commented on matters of fact by instructing jurors to disregard Mr. Pope’s visible symptoms.

Under Article IV, Section 16 of the Washington Constitution, “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” Wash. Const. Article IV, Section 16. In this case, the trial judge improperly commented on matters of fact, in violation of Article IV, Section 16.

In particular, the judge instructed jurors to disregard Mr. Pope’s physical symptoms—visible throughout the trial—and thus prevented Mr. Pope from arguing the central point of his defense (that he could not have inflicted the injury in the manner claimed by Hallsted). RP (12/7/11 voir dire) 10. This was error. Although the prosecution is prohibited from using an accused person’s off-the-stand demeanor as evidence of guilt,¹² nothing prevents the defense from arguing that the defendant’s visible physical characteristics are inconsistent with the prosecution’s version of events.

For example, a defense attorney should be able to say that his or her dark-skinned client is not the Caucasian perpetrator described by

¹² See, e.g., *State v. Rafay*, 168 Wash. App. 734, ___ n. 176, 285 P.3d 83 (2012) (citing *State v. Klok*, 99 Wash.App. 81, 85, 992 P.2d 1039 (2000)); *United States v. Schuler*, 813 F.2d 978, 979 (9th Cir. 1987); *United States v. Pearson*, 746 F.2d 787, 796 (11th Cir. 1984).

witnesses to a crime, even if the client does not testify. Similarly, a diminutive elderly woman should be allowed to argue that she could not have inflicted the injuries suffered by the tall and muscular young man she's accused of assaulting, even if she declines to take the witness stand.

In this case, jurors could see that Mr. Pope suffered from uncontrollable tremors. They should have been allowed to consider that fact when evaluating Hallsted's claim that he received his bloody nose when Mr. Pope punched him with his right hand. The court's instruction—that "[t]his is not a fact in the case"—prohibited jurors from considering Mr. Pope's medical condition during their deliberations. The court's remark was an improper comment on the evidence, in violation of Wash. Const. Article IV, Section 16.

The error is presumed prejudicial, unless the record affirmatively shows that no prejudice resulted. *Levy*, at 725. The record is devoid of any affirmative indication that the error was harmless under the *Levy* test. Accordingly, Mr. Pope's convictions must be reversed and the case remanded for a new trial. *Id.*

C. The error was not invited by defense counsel.

Under the invited error doctrine, "a party may not set up error at trial and then complain about the error on appeal." *State v. Korum*, 157 Wash. 2d 614, 646, 141 P.3d 13 (2006) (emphasis added). The invited

error doctrine does not bar review in this case because Mr. Pope did not “set up” the error.

When defense counsel asked that the jury be informed about Mr. Pope’s symptoms, the prosecutor said he “would also like for the jury to be instructed that they should know this, but that fact is not evidence to be used by them in deliberations.” RP (12/6/11 pm) 41. He went on to suggest “that it would be appropriate to tell the jury when you introduce the Defendant but that the fact that he suffers from Parkinson's is not evidence to be used by you in your deliberations.” RP (12/6/11 pm) 42.

Defense counsel indicated that he

would have no objection to the Court addressing that or making that introduction, if the Court feels it's more appropriate coming from the Bench than from myself. You know, I certainly defer to the Court on that idea.
RP (12/6/11 pm) 42.

Defense counsel did not propose any language regarding how the jury should treat Mr. Pope’s symptoms. Accordingly, it cannot be said that Mr. Pope “set up” or invited the error. *Korum*, at 646.

III. MR. POPE’S CONVICTION FOR ATTEMPTED VEHICLE THEFT VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT’S INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS OF THE CRIME.

A. Standard of Review

Constitutional violations are reviewed de novo, as are jury instructions. *E.S.*, at 702; Jury instructions are reviewed de novo. *State v. Bashaw*, 169 Wash.2d 133, 140, 234 P.3d 195 (2010), overruled on other grounds by *State v. Nunez*, 174 Wash. 2d 707, 285 P.3d 21 (2012). Instructions must make the relevant legal standard manifestly apparent to the average juror. *State v. Kyllo*, 166 Wash.2d 856, 864, 215 P.3d 177 (2009).

B. Due process requires the prosecution to prove every element of an offense beyond a reasonable doubt.

Due process requires the prosecution to prove every element of the charged crime. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A trial court’s failure to instruct the jury as to every element violates due process. U.S. Const. Amend. XIV; *State v. Aumick*, 126 Wash.2d 422, 429, 894 P.2d 1325 (1995). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of an offense violates due process. *State v. Thomas*, 150 Wash.2d 821, 844, 83 P.3d 970

(2004). Such an error is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wash.2d 330, 341, 58 P.3d 889 (2002).

C. The court's instructions relieved the state of its burden to prove that Mr. Pope engaged in conduct corroborating the intent to commit the specific crime of theft of a motor vehicle.

A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime. RCW 9A.28.020. A "substantial step" is "conduct strongly corroborative of the actor's criminal purpose." *State v. Workman*, 90 Wash.2d 443, 451, 584 P.2d 382 (1978); *Aumick*, at 427.

In this case, the trial court gave an instruction that differed from the definition of "substantial step" adopted by the *Workman* Court. The court's instruction defined "substantial step" (in relevant part) as "conduct that strongly indicates a criminal purpose..." Instruction No. 13, Supp. CP (emphasis added). This instruction was erroneous for two reasons.

First, the instruction requires only that the conduct indicate (rather than corroborate) a criminal purpose. The word "corroborate" means "to strengthen or support with other evidence; [to] make more certain." The *American Heritage Dictionary* (Fourth Ed., 2000, Houghton Mifflin Company) (emphasis added). The *Workman* court's choice of the word

“corroborative” requires the prosecution to provide some independent evidence of intent, which must then be corroborated by the accused’s conduct. Instruction No. 13 removed this requirement by employing the word “indicate” instead of “corroborate;” under Instruction No. 13 there is no requirement that intent be established by independent proof and corroborated by the accused’s conduct. Instruction No. 13, Supp. CP.

Second, Instruction No. 13 requires only that the conduct indicate a criminal purpose, rather than the criminal purpose. This is analogous to the problem addressed by the Supreme Court in cases involving accomplice liability. See *State v. Roberts*, 142 Wash.2d 471, 513, 14 P.3d 713 (2000) (accomplice instructions erroneously permitted conviction if the defendant participated in “a crime,” even if he was unaware that the principal intended “the crime” charged); see also *State v. Cronin*, 142 Wash.2d 568, 14 P.3d 752 (2000). As in *Roberts* and *Cronin*, the language used in Instruction No. 13 permits conviction if the accused person’s conduct strongly indicates intent to commit any crime.

The end result was that the prosecution was relieved of its duty to establish by proof beyond a reasonable doubt every element of attempted theft.¹³ Under the instructions as given, the prosecution was not required

¹³ This creates a manifest error affecting Mr. Pope’s right to due process, and thus may be raised for the first time on review, pursuant to RAP 2.5(a)(3). Even if not manifest, the error may nonetheless be reviewed as a matter of discretion under RAP 2.5. See *State v.*

to provide independent corroboration of Mr. Pope’s alleged criminal intent; nor was it required to show that his conduct strongly corroborated his intent to commit the particular crime of vehicle theft. Because of this, the conviction must be reversed and the case remanded for a new trial.

Brown, *supra*.

IV. MR. POPE WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *State v. A.N.J.*, 168 Wash.2d 91, 109, 225 P.3d 956 (2010).

B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision applies to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d

Russell, 171 Wash.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must satisfy “the familiar two-part Strickland... test for ineffective assistance claims—first, objectively unreasonable performance, and second, prejudice to the defendant.” *State v. Sandoval*, 171 Wash. 2d 163, 169, 249 P.3d 1015 (2011) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); see also *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004).

The presumption of adequate performance is overcome when there is no conceivable legitimate tactic explaining counsel’s performance. *Reichenbach*, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy.¹⁴ Finally, “[a]n uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all.” *Correll v. Ryan*, 539 F.3d 938, 949 (9th Cir. 2008).

¹⁴ See, e.g., *State v. Hendrickson*, 129 Wash.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”).

These are guidelines only, not “mechanical rules.” Strickland , at 696. Instead, “the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” Id. In every case, the court must consider whether the result is unreliable because of a breakdown in the adversarial process. Id.

C. Defense counsel provided ineffective assistance by failing to adequately investigate the facts and by failing to assist his client in making an informed decision about whether to accept a plea offer or to go to trial.

Among other things, defense counsel in a criminal case should confer with the accused person without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. *United States v. DeCoster*, 487 F.2d 1197, 1203 (D.C. Cir. 1973); see also RPC 1.4.

In addition, counsel must undertake a reasonable investigation (or make a reasonable decision that particular investigations are unnecessary). *Duncan v. Ornoski*, 528 F.3d 1222, 1234 (9th Cir. 2008). Any decision not to investigate must be directly assessed for reasonableness.¹⁵ Id. A failure to investigate is especially egregious when counsel fails to consider potentially exculpatory evidence. Id, at 1234-35.

¹⁵ Furthermore, strategic choices made after less than complete investigation are only reasonable to the extent that professional judgment supports the limitations on investigation. *Foust v. Houk*, 655 F.3d 524, 538 (6th Cir. 2011).

Finally, counsel must assist the defendant “in making an informed decision as to whether to plead guilty or to proceed to trial.” A.N.J., at 111-12. Counsel must, “at the very least... reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty.” *Id.*

In this case, counsel failed to adequately investigate Mr. Pope’s case. Although he made some attempt to obtain them, counsel did not review Mr. Pope’s medical records prior to trial.¹⁶ Nor did he consult with Mr. Pope’s treating physicians, to determine the extent of Mr. Pope’s disability. Nor did counsel consult with experts, to determine whether or not a person with Mr. Pope’s condition could punch someone hard enough to cause a bloody nose. RP (12/6/11 am) 2-6; RP (12/6/11 pm) 4-43.

In addition, Mr. Pope repeatedly mentioned the 12 witnesses he wished to testify on his behalf, yet counsel did not make any effort to secure their attendance at trial.¹⁷ RP (12/7/11 voir dire) 5; Motion to

¹⁶ In fact, defense counsel did not seek authorization for public funds to obtain copies of the records until after Mr. Pope was convicted. See Motion for Funds for Copies of Health Care Records, Supp. CP.

¹⁷ In addition, Mr. Pope indicates that defense counsel failed to interview Hallsted (relying instead on his statement to the police) and two eyewitnesses with exculpatory evidence. See Motion for New Trial, pp. 6-7. This in itself might constitute deficient performance. See, e.g., *State v. Visitacion*, 55 Wash. App. 166, 174, 776 P.2d 986 (1989).

Reconsider, Supp.CP. At least one of them—Mr. Pope’s former employer, Clayton Longacres—would have been able to testify about the extent of Mr. Pope’s disability and its everyday impact on his physical capabilities. See Motion for New Trial, p. 11.

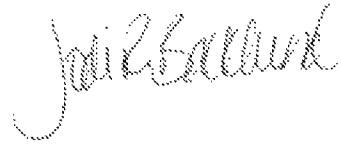
Having failed to adequately investigate the case, counsel was in no position to properly assess Mr. Pope’s chances at trial, to advise him regarding any plea offers, or to represent him at trial. A.N.J., supra; Ornoski, supra. Under these circumstances, Mr. Pope was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel. His convictions must be reversed and the case remanded for a new trial. A.N.J., supra.

CONCLUSION

For the foregoing reasons, Mr. Pope’s convictions must be reversed and the case remanded for a new trial.

Respectfully submitted on October 11, 2012.

BACKLUND AND MISTRY

A handwritten signature in cursive script that reads "Jodi R. Backlund".

Jodi R. Backlund, WSBA No. 22917
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A handwritten signature in cursive script that reads "Manek R. Mistry".

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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:

Rex Pope, DOC #942200
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

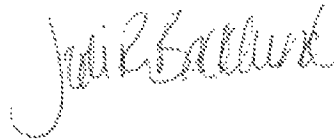
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, 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 October 11, 2012.



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

BACKLUND & MISTRY

October 11, 2012 - 1:01 PM

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