73590-0

NO. 73590-0-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent

v.

SEAN CURRAN,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. THE EXCLUDED EVIDENCE WAS RELEVANT.

The State argues that Mr. Curran was not denied his right to present a defense because he did not present a defense. Reply at 9.

This is a mischaracterization of Mr. Curran's attempt to explain why Ms. Ostergard would lie at his trial. While Mr. Curran admitted the malicious mischief, he clearly defended himself against the other charges, arguing the State's witnesses were not credible. 5/5/15 RP 224. Mr. Curran attempted to establish a motive to fabricate, which was prevented because of Mr. Curran's inability to explain Ms. Ostergard's motive. 5/5/15 PR 192. Each time Mr. Curran attempted to explain why Ms. Ostergard would lie, the State objected and the court struck the testimony. *See*, 5/5/15 RP 192, 5/5/15 RP 193, 5/5/15 RP 200, 5/5/15 RP 206, 5/5/15 RP 207.

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)). A defendant's right to be heard in his defense, including the rights to examine witnesses against him and to offer

testimony, is basic in our system of jurisprudence. *Jones*, 168 Wn.2d at 720.

The "integrity of the truth finding process" and the right to a fair trial must be considered before precluding defense evidence. *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). If evidence is relevant, "the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). Infringing upon the "weighty interest of the accused" abridges this essential right. *State v. Cayetano-Jaimes*, 190 Wn.App. 286, 297-98, 359 P.3d 919 (2015) (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (quoting *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998)). Reversal for a violation of the constitution is required unless the court finds it is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

While the State cites *State v. Gonzalez-Mendoza* for the proposition that exclusion of testimony regarding motive and intent to fabricate is proper, this case and the argument based upon it should be disregarded. While published in an advance sheet, it was withdrawn

from the bound volume because it was published in error. *See*, 363 P.3d 593 (2015), RAP 14.1.

It was error to prevent Mr. Curran from testifying with regard to the credibility of the State's witnesses. Credibility was the central issue, which Mr. Curran's attorney made clear in his closing argument. 5/5/15 RP 224. Likewise, the State focused on credibility, focusing on the reasonableness of the motive of witnesses to tell the truth and comparing credibility. 5/5/15 RP 227-28. Preventing Mr. Curran from arguing motive and credibility denied him his right to present a defense.

2. MR. CURRAN DID NOT INVITE THE ERROR.

The State also argues Mr. Curran invited the error which he now raises upon appeal. Reply at 14. Mr. Curran does not concede that the error was invited, but if this Court finds otherwise, it should reach the issue because it is an error affecting a constitutional right. *State v. Henderson*, 114 Wn.2d 867, 876, 792 P.2d 514 (1990).

To be invited, the error must be the result of an affirmative, knowing, and voluntary act. *State v. Lucero*, 152 Wn.App. 287, 292, 217 P.3d 369 (2009), *rev'd on other grounds*, 168 Wn.2d 785, 230 P.3d 165 (2010). The defendant must materially contribute to the error

challenged on appeal by engaging in some type of affirmative action through which he knowingly and voluntarily sets up the error. *In re Pers. Restraint of Call*, 144 Wn.2d 315, 328, 28 P.3d 709 (2001); *State v. Wakefield*, 130 Wn.2d 464, 475, 925 P.2d 183 (1996). The State bears the burden of proof on invited error. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004).

Clearly, this is not a case where defense counsel purposely invited the error for which Mr. Curran now seeks relief. *Henderson*, 114 Wn.2d at 878. Defense counsel did not propose that he should be enjoined from asking Mr. Curran questions regarding motive and fabrication. Defense counsel asked Mr. Curran about motive and fabrication on multiple occasions, as did the State. *See*, 5/5/15 RP 192, 5/5/15 RP 193, 5/5/15 RP 200, 5/5/15 RP 206, 5/5/15 RP 207. His only defense to the charges was based upon credibility, which was the key issue in the questions Mr. Curran was precluded from answering. 5/5/15 RP 224.

3. THE RECORD DOES NOT SUPPORT ASSESSING APPELLATE COURT COSTS AGAINST MR. CURRAN.

Although Mr. Curran did not raise as error the question of whether legal financial obligations were properly imposed against him,

other than to request this Court exercise its discretion in not imposing them, the State did raise the question of whether appellate court costs should be raised should Mr. Curran not substantially prevail upon appeal. Reply at 15.

The record establishes Mr. Curran is presently indigent. As a general matter, the imposition of costs against indigent defendants raises problems that are well documented and include "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *State v. Blazina*, 182 Wn.2d 827, 839, 344 P.3d 680 (2015).

Mr. Curran maintains the position that the court's decision below to only impose mandatory fees is sufficient evidence for this Court to be persuaded of his inability to pay additional fees. The State also recognizes Mr. Curran was unemployed and unable to pay for appellate counsel when this appeal was filed. Reply at 16. The Court below found Mr. Curran had no ability to pay when he was convicted. His situation has not improved with his conviction for a crime against person. The imposition of additional fines and fees will increase his difficulty in reentering society and should not be imposed.

There is no indication that the substantial fees imposed upon appeal will be payable by Mr. Curran. Because this court is not obligated to impose the cost of appeal, it should decline to do so. *State v. Sinclair*, ___ P.3d ___, 72102-0-I, 2016 WL 393719, at *6 (Wash. Ct. App. Jan. 27, 2016)

B. CONCLUSION

"The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions." *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (citing *Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)).

By excluding Mr. Curran from testifying with regard to his justification for his actions and for why the witnesses who testified against him had a motive to fabricate evidence, Mr. Curran was denied his right to present a defense.

This Court should find Mr. Curran's constitutional right to present a defense was violated and order a new trial.

DATED this 7th day of April 2016.

Respectfully submitted,

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON, Respondent, SEAN CURRAN, Appellant.	)))))))))	NO. 73590-0-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF APRIL, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	JANICE ALBERT, DPA [jalbert@co.snohomish.wa.us] SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL

SIGNED IN SEATTLE, WASHINGTON, THIS 7TH DAY OF APRIL, 2016.

X_____

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