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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 Reply Brief

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REPLY TO RESPONDENT'S STATEMENT OF FACTS

Appellant reaffirms the facts as outlined in the Opening Brief. In response to the state's Statement of Facts[1], Appellant offers the following.

Shepherd's Way worked to adopt out animals to permanent caring homes. Contrary to the state's assertion, it was significantly more complicated than merely first-come first-served. State's Brief p. 3. Mr. and Mrs. Aenk spent time with adoptive parties and the animals together, checked on proposed homes, and worked to make sure the match would be successful in the long-term. RP 342-343, 347-350, 355, 400, 423, 481-482. Additionally, the contract contemplated more analysis than simply first-dibs. Ex. 5, 6.

Elle Hatfield testified that she may have been the person who first mentioned the eventual agreed price for Baron and Quinn. RP 173. The state describes the situation differently and leaves a misleading impression. State's Brief, p. 4. Hatfield attempted to discount her statement as a joke, but she completed and signed both horse contracts with that amount noted. RP 167-169, 173, 177; Ex 5. 6.

[1] The state titled it's brief "Brief of Appellant"; however, the state is the Respondent in this matter.

ARGUMENT

I. THE TRIAL COURT VIOLATED MS. AENK'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE.

1. The violation of Ms. Aenk's constitutional right to present a defense is subject to *de novo* review.

Appellate courts review constitutional issues *de novo. State v. Samalia*, ---Wn.2d---, ___, 375 P.3d 1082 (2016). When a trial court makes a discretionary decision alleged to violate a constitutional right, review is *de novo. State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010); *State v. Iniguez*, 167 Wn.2d 273, 281, 217 P.3d 768 (2009).

Thus, for example, the *Jones* court reviewed *de novo* a discretionary decision excluding evidence under the rape shield statute because the defendant argued a violation of his constitutional right to present a defense. *Jones*, 168 Wn.2d at 719.[2] Similarly, the *Iniguez* court reviewed *de novo* the trial judge's discretionary decisions denying a severance motion and granting a continuance, because the defendant argued a violation of his constitutional right to a speedy trial. *Iniguez*, 167 Wn.2d at 280-281. That court specifically pointed out that review would

[2] Generally, the exclusion of evidence under that statute is reviewed for an abuse of discretion. *State v. Posey*, 161 Wn.2d 638, 648, 167 P.3d 560 (2007).

have been for abuse of discretion had not the defendant argued a constitutional violation. *Id*.[3]

Because Ms. Aenk alleges a violation of her constitutional right to present a defense, review here is *de novo. Id.* Respondent erroneously suggests that review is for abuse of discretion. State's Brief, pp. 21, 24. Respondent fails to recognize the constitutional nature of Ms. Aenk's claim. Under *Iniguez and Jones,* review is *de novo.*

2. The excluded statement was offered for its effect on Ms. Aenk and to show that she did not act with intent to commit second-degree theft.

The constitutional right to present a defense includes the right to introduce relevant, admissible evidence. *Jones*, 168 Wn.2d at 720. No state interest is compelling enough to prevent admission of evidence that has high probative value to the defense. *Id.*

In this case, the prosecution sought to prove attempted second-degree theft based on Ms. Aenk's attempt to confirm the validity of a $2500 check at a check cashing shop. Ms. Aenk sought to introduce testimony that Dustin Hatfield had told her to keep the check, and to use it

[3] The Supreme Court has not applied this rule consistently. For example, one month prior to its decision in *Jones*, the court apparently applied an abuse-of-discretion standard to questions of admissibility under the rape shield law, even though—as in *Jones*— the defendant alleged a violation of his right to present a defense. *State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010). This case presents an opportunity to clarify that review is *de novo* whenever a litigant alleges that a discretionary decision violates a constitutional right.

as the second payment for the adoption of two horses. CP 98-101. Hatfield's statement explained why Ms. Aenk kept the check instead of destroying it or returning it. RP 375-392, 614; CP 98-101.

The testimony was not hearsay because it was not offered for its truth. ER 801. Instead it was offered to show its effect on Ms. Aenk and to show her state of mind. *See, e.g., State v. Roberts*, 80 Wn. App. 342, 352, 908 P.2d 892 (1996) (testimony regarding out-of-court statement relevant to show state of mind). Her state of mind was relevant because the prosecution alleged that she acted "with *intent* to commit the crime of second degree theft," and that she attempted to "wrongfully obtain and exert *unauthorized* control over" the check. CP 1 (emphasis added).

Exclusion of the evidence prevented jurors from understanding why she believed she may have been entitled to the funds when she went to verify the check's validity. The trial court's refusal to allow the evidence violated Ms. Aenk's right to present a defense under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§ 3, 22. *Jones*, 168 Wn.2d at 720.

Respondent does not claim that Dustin Hatfield's statement to Ms. Aenk was inadmissible. State's Brief, pp. 21-23. The state's failure to argue this point may be treated as a concession. *See In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

Instead, the state focuses its argument on Dustin Hatfield's statement to Mr. Aenk. Brief of Respondent, pp. 22-23. But it is irrelevant that the trial court's ruling came first during Mr. Aenk's testimony. RP 348-392. The court's ruling excluded Dustin Hatfield's statement regarding the check. All parties understood it to apply to both Mr. and Ms. Aenk. RP 375-392, 492. Both Mr. and Ms. Aenk repeatedly referred to information they were not allowed to disclose to the jury.

It is true that Ms. Aenk was allowed to testify to her "understanding." But she was not allowed to tell the jury why she had that understanding.[4] She should have been allowed to tell jurors that Dustin Hatfield told her to keep the check and to use it for the second payment. The exclusion of this evidence violated her right to present a defense. *Jones*, 168 Wn.2d at 720.

3. The error is not harmless beyond a reasonable doubt.

[4] In a footnote, Respondent erroneously suggests that the error was, in part, invited. Brief of Respondent, p. 29 n. 26. This is incorrect. Ms. Aenk's sincere attempts to follow the court's order excluding the evidence did not invite the error. A contrary decision would encourage witnesses to introduce excluded testimony at every opportunity.

On one occasion, Ms. Aenk erroneously believed the court's ruling barred her from relaying a question asked by Elle Hatfield. After the court explained that she could answer, she relayed the question Elle Hatfield had asked. See Brief of Respondent, pp. 28-29 (citing RP 495). This exchange did not concern Dustin Hatfield's directive to keep the check for the second payment.

The defense rested on Ms. Aenk's belief that she was entitled to the check, based on Dustin Hatfield's statement. RP 608-617. In closing, counsel was unable to explain why Ms. Aenk had this belief. RP 571-582.

Ms. Aenk's testimony—that she believed herself entitled to the check—would have been far more credible had the court allowed her to explain that Dustin Hatfield told her to keep the check and use it for the second payment. Respondent's argument that the excluded testimony was "merely cumulative, offered in an attempt to bolster [her] testimony" is incorrect. Brief of Respondent, p. 25.[5] Testimony about her "understanding" was not the same as testimony about why she had that understanding. *See* Brief of Respondent, pp. 26-30. She should have been allowed to fully explain the source of her understanding.

A reasonable juror might have reached a different result upon hearing that Dustin Hatfield told Ms. Aenk to keep the check and to use it as the second payment. *Jones* 168 Wn.2d at 724. Her convictions must be reversed. *Id.*

[5] In addition, Respondent erroneously focuses on Mr. Aenk's testimony, again failing to recognize that the court's ruling precluded Ms. Aenk from testifying about Dustin Hatfield's statement. Brief of Respondent, p. 25.

II. THE STATE FAILED TO PROVE THIRD-DEGREE THEFT BY DECEPTION.

Ms. Aenk has run Shepherds Way Animal Rescue for 10 years. RP 343, 413, 485. She requires payment of a non-refundable adoption fee; this is reflected in her written contract. Ex. 6, 7, 8. Nothing suggested that Ms. Aenk had deceived any prior client in the adoption of a rescued animal.

In this case, delivery was not to occur until the Hatfields' property passed inspection. Ex. 6, 7, 8; RP 347, 349, 421-423. The property did not pass inspection. *See* RP 228, 358-359, 394, 397, 399-400, 407-408. Elle Hatfield canceled the contract prior to the scheduled delivery date. Ex. 14. She was not entitled to return of the nonrefundable adoption fee, which went toward care of the rescued animals. RP 342.

Under these circumstances, the state failed to prove theft by deception. No evidence suggests that Ms. Aenk behaved improperly in accepting the $500 nonrefundable adoption fee for the horse named Duke. The conviction 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.

In accordance with Division III's general order regarding appellate costs (dated June 10, 2016), Ms. Aenk submits herewith a Report as to Continued Indigency, allowing the court to consider her request to deny appellate costs.

CONCLUSION

Ms. Aenk was denied her constitutional right to present a defense. In addition, the state failed to prove theft by deception. The convictions must be reversed and Count II dismissed with prejudice.

Respectfully submitted on September 13, 2016,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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

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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 Reply 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 September 13, 2016.

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