FILED
Court of Appeals
Division I
State of Washington
5/6/2020 12:18 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
5/6/2020
BY SUSAN L. CARLSON
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SUPREME COURT NO. 98451-4

COA NO. 78379-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DERRICK DWAYNE BRANCH,

Petitioner.

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

The Honorable Andrea Darvas, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Derrick Dwayne Branch asks this Court to grant review of the court of appeals' unpublished decision in State v. Branch, 2020 WL 790830, filed February 18, 2020 (Appendix A), and the subsequent Order Denying Motion for Reconsideration, filed March 23, 2020 (Appendix B).

B. ISSUES PRESENTED FOR REVIEW

This case presents the following questions. What is the correct legal framework to evaluate a claim regarding the admission of evidence under the constitutional right to present a defense? What is the correct standard of review on appeal?

1. Is this Court's review warranted under RAP 13.4(b)(1) and (2) because the decision of the court of appeals conflicts with this Court's decisions in State v. Duarte Vela, 200 Wn. App. 306, 402 P.3d 281 (2017), State v. Jones, 168 Wn.2d 713, 720-21, 230 P.3d 576 (2010), and State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002)?

2. Is this Court's review warranted under RAP 13.4(b)(3) because it presents a "significant question" of constitutional law under the Sixth Amendment to the U.S. Constitution and article I, section 22 of the Washington Constitution: that the right to present a defense supersedes application of other court-created rules of evidence that seek to preclude highly probative evidence relevant to the defense in a criminal trial?

3. Is this Court's review warranted under RAP 13.4(b)(4) because it presents a question of "substantial public interest": whether a trial court may disregard existing Washington Supreme Court jurisprudence to exclude evidence relevant to an accused's right to present a defense on the basis of evidentiary rules where the trial court finds the evidence is highly probative and relevant to the defense?

C. STATEMENT OF THE CASE

1. Charges & Pleas

The State charged Branch with the following eight counts against Mitchell, his former girlfriend, including three no contact order violations, four counts of assault, and one count of second degree rape. CP 181-85. Branch pleaded not guilty, asserting general denial, consent, and self-defense. 1RP 130, 1365.

2. Trial Evidence

Evidence at trial showed that Mitchell had a significant and documented history of mental illness and behavioral problems beginning with childhood abuse. 1RP 1331, 1393, 1431; 2RP 150-51. As a result, Mitchell had suffered from anxiety and severe depression from as early as five years old to present. 2RP 284, 1RP 1708, 1RP 693, 844-45.

Mitchell's mental health records showed she had engaged in self-harming behaviors, such as cutting and throwing herself against walls, had

attempted suicide several times, used marijuana, and at one point regularly drank a bottle of wine per day. 1RP 846-47, 853. She testified she confided to one doctor she would sometimes see and hear people who were not there, and had hallucinations as recently as June 2016. 1RP 849-50. She had been committed to a mental health hospital in September 2016. 1RP 854.

Mitchell testified that while attending community college, she was dating Branch on and off, and also dating another man named Daniel who was physically violent toward her. 1RP 616, 702-707, 1339-40. . Sometimes after Daniel hurt her, she went to the hospital, but never reported him because he had threatened to kill her if she told anyone. 1RP 705-07, 732. Mitchell also testified Daniel, not Branch, had raped her, and as a result, she dropped out of college. 1RP 619, 727, 732, 734.

It was undisputed Mitchell and Branch's relationship was volatile and high-conflict. The dispute essentially centered on whether Branch or Mitchell was the initial aggressor. Several times Branch tried to leave the relationship, but Mitchell would begged and threatened him to get him to stay. 1RP 675-77, 736, 800-01, 856, 1055. Mitchell testified she had anger management problems, and when she and Branch argued, she would act out irrationally and initiate violence by punching or kicking him, and engaging in self harm such as cutting herself. 1RP 701, 736, 791-92. Branch never initiated violence and responded only in self-defense. 1RP 735. Mitchell

repeatedly testified her prior out-of-court statements were false accusations in order to control him, get back at him, or cover for her own poor conduct. 1RP 677-78, 739, 783, 786-87, 831-32.

Family members, medical personnel, and law enforcement testified regarding Mitchell and Branch's relationship and her prior reports of abuse. Notably, no other person ever observed violence between the two. Others observed her crying or observed minor injuries such as scrapes, bruises, or one report of a red mark around her neck after Mitchell and Branch had argued. E.g. 1RP 1114, 1117, 1119, 1345, 1348, 1352, 1353. However, the red mark observation was not related to a charged incident, but rather was offered to impeach Mitchell's statements that Branch never assaulted her. 1RP 1080-83.

Dr. Brendan Scholtz, a clinical psychologist, conducted an extensive review of Mitchell's mental health records, and testified they revealed diagnoses for early onset and continuing anxiety disorder, major depressive disorder, with worsening symptoms in recent years, and possible substance-use disorder and post-traumatic stress disorder (PTSD). 3RP 284-85, 287-882, 295. Records also showed multiple incidents of self-harming behaviors, one of which resulted in involuntary commitment. 3RP 290-91. He opined the records showed Mitchell was already experiencing anxiety

and depression for an extended period of time, and the loss of her baby made her symptoms worse. 3RP 311-12.

Dr. Schultz also opined major depression could cause hallucinations, delusional or irrational thinking, and impulsive behavior. 3RP 315, 318-19. He testified that in general, mental health hallucinations were often about ordinary rather than bizarre subjects. 3RP 292. Mitchell's record showed multiple incidents of auditory and visual hallucinations. 3RP 292-94. Also in general, people with these mental illnesses could be "especially difficult," attract mentally unstable partners, and make romantic relationships more difficult. 3RP 324-25.

Dr. Scholtz stated there were many inconsistencies in the record, including Mitchell's self-reports and denials of substance use, mental illness symptoms, and DV incidents. 3RP 352. Specifically, Mitchell sometimes denied abusing alcohol, but at other points admitted to cannabis use, admitted she drank to deal with her anxiety, including drinking a bottle of wine a night, and sought treatment at a co-occurring substance abuse and mental health treatment facility. 2RP 296-98. Dr. Scholtz testified the inconsistencies he observed in Mitchell's record were greater than he normally saw in such records. E.g. 3RP 352.

By all accounts, Mitchell was a difficult witness. Her erratic behavior repeatedly disrupted proceedings. At one point Mitchell refused

to re-enter the courtroom to complete testimony, and refused to answer the prosecutor's questions on the stand, despite repeated warnings from the court that she was under subpoena and threats that a bench warrant may issue, declaring she did not understand why everyone wanted her to lose her job. 1RP 822,825; 1RP 812-15. Mitchell then overdosed on prescription anti-anxiety medication and was escorted out by medics in the middle of her testimony. 1RP 890-91, 894, 897-98, 1053, 1908; 3RP 56-57. She also shouted at a testifying officer in the court hallway, accusing him of being a "master manipulator." 1RP 1505.

Security and medical personnel were both involved multiple times, including one incident where Mitchell assaulted officers at the courtroom doors, resisted arrest, and screamed for nearly forty (40) minutes. 3RP 33 (court's statement to parties); CP 263-64 (officer report); see also 1RP 1892 (court reporter repeatedly indicating "Woman screaming" heard in courtroom). During that incident, she shouted for help, that officers were trying to kill her, and that she could not breathe, until being carried out of the courthouse in a restraint chair with a spit bag over her head. 3RP 33; CP 263-64 (officer reports). Ultimately, she was transported to Valley Medical for a mental health evaluation. CP 263-64. Mitchell later told her victim advocate she had no memory of the incident. 3RP 247.

Some jurors were distracted by the screaming they heard. 3RP 48. The court instructed them not to speculate or allow themselves to be influenced by what happened outside the courtroom. 3RP 49.

Defense counsel moved to admit evidence of Mitchell's conduct, through testimony of the responding officers, arguing it was highly relevant to Branch's theories of self-defense and that Mitchell was the first aggressor, and to rehabilitate Mitchell's testimony that she became unreasonable, assaultive, made false accusations (and later recanted those allegations) when she did not get her way. 3RP 36; CP 246-52. The State objected, arguing the evidence was inadmissible under the Rules of Evidence. 3RP 251. The court found the evidence was "obviously really relevant," but relying on the rules of evidence, ruled it was inadmissible. 3RP 41 (quote); 1RP 1915.

In closing, the State relied heavily on Mitchell's various statements to law enforcement and health care providers, to argue it had met its burden with respect to each count. The prosecution also argued it had disproven self-defense because the only evidence of self-defense was Mitchell's incredible testimony. 1RP 1964.

The defense closing argument pointed out the State's case rested almost exclusively on Mitchell's testimony, and emphasized many of her statements were "absolutely incredible" and "fantastical." 1RP 1997-98,

2000. Given her mental health history and inconsistencies in her statements, there was more than a reasonable doubt she had manufactured the accusations. 1RP 1987. Counsel also argued, "you also know something about how she reacts when she doesn't get something that she wanted," in reference to her refusal to answer the prosecutor's questions on the stand when she had wanted to go to work. 1RP 2001. Consistent with the court's ruling, counsel did not refer to Mitchell's reactions to law enforcement when they prevented her from entering the courtroom. See 1RP 2001.

3. Verdict & Sentence

The jury found Branch guilty of the three NCO violations and second degree rape, not guilty of one count of assault II by strangulation, and convicted him of the lesser counts of assault IV for the two remaining second degree assault charges. 1RP 2074-76. The court found the DV designations and aggravators. 3RP 385.

At sentencing, the court found count V violated double jeopardy and dismissed it. 2RP 52-53; CP 529. The State requested the high end of the standard range on the remaining counts. 2R 59-60. Branch requested an exceptional sentence down on the two felonies, but the sentencing court concluded it lacked discretion and imposed an indeterminate sentence of 146 months to life on the second degree rape among other sentences. CP

534-35, 544. The court also found Branch indigent, but imposed supervision fees. 2RP 107-08; CP 536, 540 (Appendix H).

4. Appellate Arguments & Decision

Branch timely appealed. CP 554-55. In his opening brief he argued his right to present a defense was violated by the exclusion of probative evidence necessary to rehabilitate Mitchell. Br. App. 24. He also argued the trial court failed to recognize its discretion to impose an exceptional sentence downward, and the costs of community custody were discretionary and must be stricken due to his indigency. Br. App. at 37, 55.

In his Statement of Additional Grounds, Branch raised several claims incorporated in totality here. SAG at 1-4; Supp. SAG at 1-3. Branch's primary argument was that the prosecutor committed misconduct by eliciting from Mitchell why she had dropped out of college. SAG, at 2 (citing Exs 21, 117). Branch reasoned the exhibits showed the prosecutor knew Mitchell would answer she dropped out because she had been raped, and that the prosecutor had intended to imply to the jury that Branch was the perpetrator despite Mitchell's denials. SAG, at 2-3 (citing Exs 21, 117). In addition, Branch's claims also raised additional trial errors, including that when the prosecutor solicited an improper opinion from expert witness Dr. Arthur Sullivan, referred to his prior unrelated arrest in questioning as well as opening and closing statements, solicited information about unrelated

sexual acts in violation of ER 403 and 404(b), . SAG at 3-4; Supp. SAG at 2-3.

The Court of Appeals found the trail court had erred by failing to recognize its discretion to impose an exceptional sentence downward, and by imposing the costs of community custody despite Branch's indigency. Branch, 2020 WL 790830 at *4-*5. The court rejected Branch's claims raised in his initial and supplemental statement of additional grounds. Id. *5-*6. The court remanded to permit the trial court to consider its discretion to impose an exceptional sentence downward and to strike the discretionary costs of community custody. Id. at *6.

Regarding the right to present a defense, the Court of Appeals reasoned Branch's claim was an evidentiary ruling properly evaluated under ER 404(b) and 608(b). Id. at *2-*3. It further reasoned, "The defendant's right is subject to reasonable restrictions and must yield to 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" Id. at *2 (quoting State v. Finch, 137 Wn.2d 792, 825, 975 P.2d 967 (1999) (citing Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973))). The court also reasoned, "Unlike in Jones, the proffered evidence here did not make up Branch's 'entire defense.' So the evidence of S.M.'s disruptive behavior did not carry the same weight that the evidence did in Jones." Id.

at *3. The court concluded the evidence of Mitchell's disruptive behavior was inadmissible because it "did not occur during or in connection with any of the charged crimes." Id. at *3.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

THIS COURT'S REVIEW IS WARRANTED TO CORRECT THE COURT OF APPEALS' MISAPPLICATION OF THE STANDARDS RELEVANT TO THE RIGHT TO PRESENT A DEFENSE.

1. The court of appeals' decision conflicts with published Supreme Court and Court of Appeals decisions under RAP 13.4(b)(1) and (2).

The court of appeals' decision conflicts with Court of Appeals and Supreme Court decisions in Duarte Vela, 200 Wn. App. 306, Jones, 168 Wn.2d at 720-21, and Darden, 145 Wn.2d at 620.

The Sixth Amendment and article I, section 22 grant an accused two separate but related rights: (1) the right to present testimony in one's defense and (2) the right to confront and cross-examine adverse witnesses. U.S. CONST., Amend. VI; WASH. CONST., art. I, §22; State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983) (citing Washington v. Texas, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); Chambers, 410 U.S. 284). Taken together, these rights constitute the right to present a defense. Duarte Vela, 200 Wn. App. at 317 (citing Jones, 168 Wn.2d at 720-21).

These rights are not absolute. Darden, 145 Wn.2d at 620. Evidence "must be of at least minimal relevance." Id. at 622. "[I]f 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." Id. The State's interest in excluding prejudicial evidence must also "be balanced against the defendant's need for the information sought," and relevant information can be withheld only "if the State's interest outweighs the defendant's need." Id. Where evidence has "*high* probative value 'it appears no state interest can be compelling enough to preclude its introduction.'" Jones, 168 Wn.2d at 720 (emphasis in original) (quoting Hudlow, 99 Wn.2d at 16).

Generally, a trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. Diaz v. State, 175 Wn.2d 457, 462, 285 P.3d 873 (2012). However, a violation of the constitutional right to present a defense is reviewed *de novo*. Jones, 168 Wn.2d at 719.

As noted above, Darden, Jones set forth this Court's and the framework for assessing the admissibility of evidence in light of a defendant's right to present a defense. The Court of Appeals recently reaffirmed this framework in Duarte Vela, and this Court declined to review or modify that published opinion. These cases also define the appellate standard of review for such claims.

Instead of applying the proper standard for review of a constitutional right to present a defense claim, the court of appeals quoted from Finch. Branch, 2020 WL 790830 at *2. Finch is inapplicable. That case involved a two third party witnesses. Finch, 137 Wn.2d at 824. The State presented testimony from Finch's co-worker who stated Finch had told him he had deliberately shot an officer. Id. Finch then sought to present rebuttal testimony from another witness who would state Finch told her he had not intended to kill the officer. Id. The Supreme Court upheld the trial court's exclusion, noting had this testimony been admitted, the defendant could not be cross-examined about his self-serving statement. Id. Thus, the defendant had a right to present his defense that he did not intend to kill the officer, could have done so through his own testimony, and chose not to.

By contrast, here, Mitchell and the officers Branch sought to call would all be subject to cross-examination by the State, and there was no alternative means by which Branch could place this evidence before the jury. Rather it was excluded entirely.

Moreover, Finch was decided in 1999, more than a decade prior to Jones and its progeny. Although Finch analyzed the exclusion of evidence under the abuse of discretion standard applicable to general evidentiary rulings, the Jones line of cases clarifies that the constitutional right to present a defense required *de novo* review and a separate framework.

Compare Finch, 137 Wn.2d at 825 (abuse of discretion); with Jones, 168 Wn.2d at 717-18 (separate framework), 719 (*de novo* review).

To hold otherwise conflicts with the express holding of Jones, 168 Wn.2d at 717-18, 721. Jones held that regardless of the rape shield statute, the right to present a defense framework must be applied, and where met, the evidence must be admitted regardless of purported exclusion by other non-constitutional evidentiary rules. Id.

Although this Court recently declined to accept review of a right to present a defense case in Duarte Vela, Branch's case illustrates why this Court should nonetheless accept review of the issue under RAP 13.4(b)(1) and (2). Doing so is necessary to clarify the reasoning of Duarte Vela, Jones, and Darden, to set forth the proper framework for admissibility and the proper standard of review on appeal, to clarify these decisions in light of the outdated and inapplicable standards here cited from Finch, and to correct the court of appeals' misapprehension of this Court's existing jurisprudence.

2. This case presents a significant question of federal and State constitutional law under RAP 13.4(b)(3).

As discussed above, this case addresses the correct legal standards to be applied to evidence admissibility and appellate review for claims of the right to present a defense. As such, it presents a significant question of

law under Washington's Constitution, article I, section 22 and the Sixth Amendment to the U.S. Constitution defining the rights of an accused to present evidence and cross-examine witnesses.

This Court should accept review under RAP 13.4(b)(3). Doing so presents the opportunity to clarify the proper legal standards, correct the court of appeals' misapplication of existing law, and outdated standards from Finch from undermining this Court's recent mandate in Duarte Vela.

3. This case presents an issue of substantial public interest under RAP 13.4(b)(4).

This case creates a compelling issue of substantial public interest because left unchecked, the court of appeals' flawed reasoning will erode important constitutional protections for all individuals in Washington accused of crimes.

Under the reasoning of the court of appeals, an accused lacks a constitutional right to present a defense where the evidence is otherwise inadmissible under court- or legislatively-created rules. Branch, 2020 WL 790830 at *2. This reasoning completely eradicates the right to present a defense. The constitutional right to present a defense is meaningful only where it operates as a check against evidentiary rules created by courts and legislatures. If the right does not exist unless evidence is otherwise admissible, then the right ceases to exist entirely.

This Court should accept review under RAP 13.4(b)(4), to prevent such tautological reasoning from proliferating, and to preserve the constitutional right to present a defense for all accused persons in Washington.

E. CONCLUSION

For the aforementioned reasons, Branch respectfully asks this Court to grant review under RAP 13.4(b)(1), (2), (3), and (4).

Branch also respectfully requests that this Court grant review of his SAG claims under RAP 13.4(b)(4) because a decision accepting his claims could potentially impact a large number of petitions in Washington State.

DATED this 6th day of May, 2020.

Respectfully submitted,

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_____

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APPENDIX A

2020 WL 790830
Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 1.

STATE of Washington, Respondent,
v.
Derrick Dwayne BRANCH, Appellant.

NO. 78379-3-I
|
FILED: February 18, 2020

Honorable Andrea A. Darvas, Judge

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UNPUBLISHED OPINION

Leach, J.

***1** Derrick Dwayne Branch appeals his convictions for domestic violence felony violation of a court order and rape in the second degree-domestic violence. First, he challenges the trial court's exclusion of evidence of the victim's actions outside of the courtroom during trial. He also claims that the trial court did not exercise available discretion to consider an exceptional sentence down. Finally, he asserts the trial court erred by imposing the community custody supervision cost on him.

Branch offered the evidence of the victim's actions outside of court as propensity evidence. Because Branch cannot show that ER 404(b) is "arbitrary or disproportionate to the purpose it was designed to serve,"[1] his constitutional challenge to the rule as applied fails. But the sentencing court incorrectly decided it did not have discretion to impose an exceptional sentence down. Also, the court should not have imposed the supervision cost on Branch because he is indigent. So we affirm his convictions but remand for resentencing.

FACTS

Derrick Dwayne Branch and S.M. met in February 2015 and began a romantic relationship. After S.M. moved in with Branch, she returned home with physical injuries. On July 1, 2015, Valley Medical Center emergency department treated S.M., where she reported that her boyfriend attacked and raped her.

On June 1, 2016, S.M. reported domestic violence at the Des Moines Police Department. The next day, the Des Moines Police Department responded to a 911 call, where S.M. reported that her boyfriend choked her. She was transported to the emergency room at Highline Medical Center where she reported that her boyfriend physically and sexually abused her during their relationship. S.M. went to Des Moines Police Department again on June 3, 2016, and reported more details about the prior rape and abuse from her boyfriend.

S.M. then obtained a protection order against Branch. On numerous occasions, Branch was seen with S.M. after the court entered a no-contact order.

The State charged Branch with four counts of assault, three counts of violation of a no-contact order, and one count of rape.

At trial, S.M. testified that Branch never assaulted or raped her. She explained that her injuries were either caused by someone other than Branch or by herself when she would attack Branch and he would defend himself.

The court ordered that S.M. not enter the courtroom during trial. S.M. tried to enter the courtroom during trial while a defense witness was testifying. Officer Neher stepped outside the courtroom after seeing S.M. and told her that she was not allowed in the courtroom per the court's order. As Officer Neher radioed for assistance,

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S.M. shoved him into the door and then shoved him to the side to try to get inside the courtroom. After additional officers arrived, S.M. spit on multiple officers. She repeatedly yelled, "He's trying to kill me."

At trial, Branch asked the court to admit evidence of S.M.'s behavior outside of the courtroom to "rehabilitate [S.M.'s] credibility as to what she does when she does not get what she wants." He said that her conduct was "probative of truthfulness." He also said that her conduct was relevant to Branch's theory of self-defense.

***2** The court excluded the evidence. It stated that her actions were relevant "because they made her testimony that she was the first aggressor on a number of occasions—it bolstered that testimony, it made that testimony more believable." But it concluded that the evidence was propensity evidence and the rules "don't really allow any wiggle room to admit."

The jury found Branch guilty of domestic violence felony violation of a no-contact order and domestic violence rape in the second degree. At sentencing, defense counsel requested an exceptional sentence down on both counts. Branch asserted that his failed defenses of self-defense and consent provided the legal basis for this exceptional sentence. During the sentencing hearing, the trial court noted Branch's history, including a brain injury he suffered where he "had bleeding in [his] brain" and was "in a coma for a period of time." It expressed uncertainty about the causal connection between the high-conflict relationship of S.M. and Branch and his head injury or trauma. It speculated that Branch's experiences could have affected his ability to have healthy relationships and affected his ability to control himself.

The court ultimately concluded,

> [N]othing that I've just described seems to be a valid basis under the law for the Court to impose an exceptional sentence down; so what I'm left with is [Branch's] argument about failed defenses, and I do not believe that this is an appropriate basis for the Court to grant an exceptional sentence down."

The court stated twice that if it "had unlimited discretion," it would reduce the sentence. It stated, "[G]iven your history, [the sentencing range] strikes me as too high, but I don't believe that I have a legal basis to exercise discretion to sentence you to something below that."

After concluding that Branch was indigent, the court ordered Branch to "[p]ay supervision fees as determined by the Department of Corrections." Branch appeals.

ANALYSIS

Branch raises three issues. First, he claims that the exclusion of evidence about S.M.'s actions outside the courtroom violated his constitutional right to present a defense. Second, he claims that the trial court had the right to impose an exceptional sentence and would have if it correctly understood its authority. Finally, he contends that his indigency prevents the imposition of supervision fees. We reject Branch's constitutional claim but agree with his other claims.

Exclusion of Victim's Conduct during Trial

Branch claims that his constitutional right to present a defense entitled him to present evidence of S.M.'s actions outside of the courtroom during trial. He claims that this evidence was directly relevant to S.M.'s testimony that she assaulted Branch and made false accusations against him. We disagree because the offered evidence was propensity evidence inadmissible under ER 404(b).

We review de novo a claimed violation of a defendant's right to present a defense under the Sixth Amendment of the United States Constitution.[2]

A criminal defendant has a constitutional right to question witnesses, offer evidence in his or her defense, and present a defense consisting of relevant evidence that is not otherwise inadmissible.[3] An evidence rule violates this constitutional right "when it infringes on a weighty interest of the defendant and is arbitrary or disproportionate to the purpose it was designed to serve. But the defendant's right to present a defense also has limits."[4] The defendant's right is subject to reasonable restrictions and must yield to "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and

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innocence."[5]

***3** Branch offers the out-of-court incident to prove "the credibility of [S.M.'s] testimony that she had assaulted and made false accusations against Branch." But ER 608(b) prohibits the use of extrinsic evidence to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness unless the specific instances are probative of the character for truthfulness or untruthfulness of the witness.

Here, the evidence that S.M. attacked police officers outside of the courtroom and then claimed they were trying to kill her does not show her character for truthfulness. Instead of offering evidence of S.M.'s character for truthfulness, which ER 608(b) allows, Branch offered the evidence to show that because S.M. assaulted police and accused a police officer of trying to kill her, she must have assaulted Branch and made false accusations against him. This is propensity evidence.[6] We have previously held that ER 404(b)'s prohibition on the admissibility of third party propensity evidence does not violate a defendant's constitutional right to present a defense.[7] So the trial court's exclusion of evidence of S.M.'s disruptive behavior did not violate Branch's constitutional right to present a defense.

Branch claims that the court incorrectly analyzed whether to allow S.M.'s actions outside of the courtroom because "[r]ather than relying on the rules of evidence, when the constitutional right to present a defense was raised, the court must apply the rules articulated in Darden and Jones." He states that the evidence was "so relevant and so probative" it must be admitted and that this is "precisely the standard in Jones."

Branch's misreads State v. Jones[8] and State v. Darden.[9] In Jones, the defendant, Christopher Jones, was accused of forcibly raping his niece, K.D.[10] Jones wished to testify that the sexual encounter was consensual and took place during an "all-night, drug-induced sex party" where both Jones and K.D. participated.[11] The trial court ruled that Jones could not so testify and also refused to allow Jones to cross-examine witnesses about the sex party.[12] A jury convicted Jones of second degree rape.[13]

On appeal, the Washington Supreme Court held that the proffered evidence about the night of the alleged rape "is evidence of extremely high probative value; it is Jones's entire defense."[14] The court stated that the rape shield statute did not apply to bar evidence of relevant circumstances in that case because the event was not "past sexual behavior" excluded by the rape shield statute.[15]

Unlike in Jones, the proffered evidence here did not make up Branch's "entire defense." So the evidence of S.M.'s disruptive behavior did not carry the same weight that the evidence did in Jones.[16] And S.M.'s actions did not occur during or in connection with any of the charged crimes.

Similar to Jones, Darden involved the defendant's ability to present evidence about the event giving rise to the criminal charges.[17] Also, the court there stated the relevant evidence should have been admitted at trial because there were "no ground[s] to prevent relevant cross-examination of the State's key witness."[18] But here, ER 404(b) required exclusion of the evidence, and S.M.'s actions did not occur during or in connection with any of the charged crimes.

***4** Branch was still able to present relevant evidence supporting his central defense theory. The Washington Supreme Court recently held that where a defendant was still "able to present relevant evidence supporting her central defense theory" despite limitations placed on proffered testimony by the court's evidentiary rulings, the defendant's Sixth Amendment right to present a defense is not violated.[19] The trial court did not deprive Branch of his constitutional right to present a defense.

Exceptional Sentence

Branch also claims that the trial court had discretion under the Sentencing Reform Act of 1981[20] to impose an exceptional sentence.

Where a defendant has requested an exceptional sentence below the standard range, "review is limited to circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range."[21] "While no defendant is entitled to an exceptional sentence below the standard range, every defendant is entitled to ask the trial court to consider such a sentence and to have the alternative actually considered."[22] Thus, "[t]he failure to consider an exceptional sentence is reversible error."[23] Similarly, "[a] trial court's erroneous belief that it lacks the discretion to depart downward from the standard sentencing range is itself an abuse of discretion warranting remand."[24]

Branch claims that the trial court abused its discretion because it stated that it did not believe it had a legal basis to exercise discretion to sentence him to an exceptional

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sentence after discussing how his history, including a traumatic brain injury and abuse, may have impacted his ability to have healthy relationships or control himself.

RCW 9.94A.535 provides guidance for mitigating circumstances in sentencing. RCW 9.94A.535(1) provides illustrative mitigating circumstances and states that they are "illustrative only and are not intended to be exclusive reasons for exceptional sentences."

While "a trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion[,]"[25] that did not happen here. The court stated, "[G]iven your history, [the sentencing range] strikes me as too high, but I don't believe that I have a legal basis to exercise discretion to sentence you to something below that." It also stated that Branch's failed defenses was the only mitigating circumstance before it, which it did "not believe that that is an appropriate basis for the Court to grant an exceptional sentence down." These statements show that the court did not believe it had the discretion to impose an exceptional sentence down. Also, the sentencing court's repeated statements that how it wished to exercise discretion to impose an exceptional sentence down by stating "if I had unlimited discretion," we can infer the court understood that it did not have discretion to do so.

In State v. Bunker,[26] the jury found the defendant guilty of violating a no-contact order with Hiatt. Bunker asked the court to impose an exceptional mitigated sentence based on the mitigating factor that Hiatt was a willing participant.[27] The trial court stated, "[U]nfortunately, under the statute and the case law I don't think I have the discretion to impose an exceptional sentence downward. If I did have that discretion, I would probably do it."[28] This court held that while Hiatt's consent was not a defense to the crime charged, the trial court erroneously concluded that it did not have the discretion to consider it as a mitigating factor.[29] While the court here did state that there was no evidence that S.M. consented and, therefore, the consent would not be taken into account in imposing a sentence down, the court's statements about its lack of discretion show that it did not understand that it could consider factors outside of the enumerated factors listed in RCW 9.94A.535(1).

***5** If the sentencing court here had looked at the evidence, analyzed various mitigating factors, then concluded that it did not find any mitigating factors existed for which to impose an exceptional sentence down, then the court would have exercised its discretion. But the court stated various factors that affected Branch's behavior and stated that the sentencing range is too high and it does not believe it has a legal basis to exercise discretion to impose an exceptional sentence down. This shows that the court did not exercise its discretion. We remand so that it can.

Discretionary Costs

Branch challenges the court's order for him to "[p]ay supervision fees as determined by the Department of Corrections." He claims that he is indigent and because the court "waive[d] any nonmandatory financial penalties" and the community supervision fee is a nonmandatory cost, the court must strike it.

The State asserts that the community supervision fee is a "fee" and not a "cost." We have already held that "costs of community custody ... are discretionary [legal financial obligations]."[30] And RCW 10.01.160 prohibits courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing.[31] Because Branch is indigent and the community supervision cost is discretionary, we remand for the superior court to strike the community supervision cost.

Statement of Additional Grounds

Branch submitted a statement of additional grounds for review. Under RAP 10.10, a defendant may file a pro se statement of additional grounds for review to identify and discuss those matters that the defendant believes have not been adequately addressed by counsel.[32] We will not consider a defendant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors.[33] We are also not obligated to search the record for support of claims made in a defendant's statement of additional grounds for review.[34]

In his statement of additional grounds, Branch first asserts that "the prosecutor asked objectionable questions knowing that [S.M.'s] answers would introduce inadmissible evidence into the trial" and that his "trial counsel did not preserve this error for appeal." However, on this point, Branch does not identify any inadmissible evidence introduced by the State.

Branch also asserts, "The prosecutor's behavior violated rape shield as well as the motions in limine." First,

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Branch may not seek relief for a violation of the rape shield statute because he may not raise claims for third parties. The rape shield statute provides protection to victims, not defendants.[35] Second, Branch does not point to any motions in limine that the prosecutor violated.

Branch claims that the prosecutor discussed his unrelated arrests, violating his right to a fair trial. However, the portions of the record that Branch cites to when he states the prosecutor used S.M.'s health records to discuss his unrelated arrests relate to hearings that did not take place in front of the jury. So this claim fails.

Finally, Branch states that during S.M.'s testimony, she said she was "planting seeds" of false evidence to control him and stop him from leaving the relationship. But he does not identify or assign any specific error to this testimony, so we will not address this issue.[36]

Supplemental Statement of Additional Grounds

***6** In his supplemental statement of additional grounds for review, Branch claims that the trial court erred by allowing S.M. to testify at trial that "it was not [her] intention to do anything sexual with [Branch], [She] wanted to talk and that is not what he had in mind." Branch claims that this statement violated ER 403.

ER 403 prohibits the trial court from admitting relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice." " ' "[U]nfair prejudice" is that which is more likely to arouse an emotional response than a rational decision by the jury' " and "suggest[s] a decision on an improper basis."[37] "[N]early all evidence will prejudice one side or the other," and "[e]vidence is not rendered inadmissible under ER 403 just because it may be prejudicial."[38]

A trial court sits in the best position to determine the prejudicial effect of evidence.[39] This court reviews a trial court's decision to admit or exclude evidence for abuse of discretion.[40] A trial court abuses its discretion when it makes a manifestly unreasonable decision or bases its decision on untenable grounds or reasons.[41]

To convict Branch of domestic violence misdemeanor violation of a court order, the State had to prove that a no-contact order was in place, that Branch knew of the no-contact order, and that he knowingly violated the order prohibiting contact with S.M.[42]

Here, the trial court did not abuse its discretion in allowing S.M.'s statement under ER 403. The evidence that Branch intended to be with S.M. while she was in the hospital and in violation of the no-contact order had probative value, and the statement expressly contradicted Branch's defense, which was that S.M. was the provoker. And S.M.'s statement that "I wanted to talk and that is not what he had in mind" does not in and of itself express that Branch was "sexually abusing [S.M.] in the psych ward," as Branch claims. Also, S.M. had already testified that Branch was in the bathroom with her on that date with his pants down before the court admitted the challenged statement. So in light of all the evidence, S.M.'s statement was not unduly prejudicial. The trial court did not abuse its discretion by allowing S.M.'s statement.

CONCLUSION

We remand for resentencing. Branch does not show that the trial court erred by excluding evidence of S.M.'s behavior outside the courtroom. But the trial court erroneously understood that it did not have discretion to impose an exceptional sentence down. Finally, because Branch is indigent, the trial court should not have imposed the supervision costs.

WE CONCUR:

Verellen, J.

Appelwick, C.J.

All Citations

Not Reported in Pac. Rptr., 2020 WL 790830

Footnotes

1 State v. Donald, 178 Wn. App. 250, 263, 316 P.3d 1081 (2013).

2 State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

3 Jones, 168 Wn.2d at 720; State v. Rafay, 168 Wn. App. 734, 794-95, 285 P.3d 83 (2012).

4 Donald, 178 Wn. App. at 263.

5 State v. Finch, 137 Wn.2d 792, 825, 975 P.2d 967 (1999) (citing Chambers v. Mississippi, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)).

6 Propensity evidence is prohibited where "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." ER 404(b)(1).

7 Donald, 178 Wn. App. at 263.

8 168 Wn.2d 713, 230 P.3d 576 (2010).

9 145 Wn.2d 612, 41 P.3d 1189 (2002).

10 Jones, 168 Wn.2d at 717.

11 Jones, 168 Wn.2d at 721.

12 Jones, 168 Wn.2d at 717-18.

13 Jones, 168 Wn.2d at 718-19.

14 Jones, 168 Wn.2d at 721.

15 Jones, 168 Wn.2d at 722.

16 Jones, 168 Wn.2d at 721.

17 Darden, 145 Wn.2d at 625 (explaining how where the State charged the defendant with drug possession, the defendant's proffered evidence regarding the officer's surveillance location was admissible).

18 Darden, 145 Wn.2d at 626.

19 State v. Arndt, No. 95396-I, slip op. at 31-32 (Wash. Dec. 5, 2019), http://www.courts.wa.gov/opinions/pdf/953961.pdf.

20 Ch. 9.94A RCW.

21 State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

22 State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

23 Grayson, 154 Wn.2d at 342.

24 State v. Bunker, 144 Wn. App. 407, 421, 183 P.3d 1086 (2008) (citing Garcia-Martinez, 88 Wn. App. at 329-301).

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25 Garcia-Martinez, 88 Wn. App. at 330.

26 144 Wn. App. 407, 411, 183 P.3d 1086 (2008).

27 Bunker, 144 Wn. App. at 411.

28 Bunker, 144 Wn. App. at 411.

29 Bunker, 144 Wn. App. at 421.

30 State v. Lundstrom, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018), review denied, 193 Wn.2d 1007 (2019).

31 RCW 10.01.160(3); State v. Ramirez, 191 Wn.2d 732, 746, 426 P.3d 714 (2018).

32 RAP 10.10(a).

33 RAP 10.10(c).

34 RAP 10.10(c).

35 Jones, 168 Wn.2d at 722.

36 RAP 10.10(c) ("[T]he appellate court will not consider a defendant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors.").

37 State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000) (first alteration in original) (quoting State v. Gould, 58 Wn. App. 175, 183, 791 P.2d 569 (1990)).

38 Carson v. Fine, 123 Wn.2d 206, 224, 867 P.2d 610 (1994).

39 State v. Powell, 166 Wn.2d 73, 81, 206 P.3d 321 (2009).

40 State v. Gunderson, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014).

41 Gunderson, 181 Wn.2d at 922.

42 RCW 26.50.110(1)(a)(iii).

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APPENDIX B

RICHARD D. JOHNSON,
Court Administrator/Clerk

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March 23, 2020

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CASE #: 78379-3-I
State of Washington, Respondent v. Derrick Dwyane Branch, Appellant

Counsel:

Enclosed please find a copy of the Order Denying Motion for Reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk
LAW

Enclosure

c: Reporter of Decisions

FILED
3/23/2020
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. DERRICK DWAYNE BRANCH, Appellant.	)	No. 78379-3-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, Derrick Branch, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

FOR THE COURT:

Leach, J.

NIELSEN KOCH P.L.L.C.

May 06, 2020 - 12:18 PM

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