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NO. 65308-3-I

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

ERIC FRANKLIN COSTON,
APPELLANT,
V.
STATE OF WASHINGTON
RESPONDENT.

APPELLANT'S OPENING BRIEF

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INTRODUCTION

Appellant Eric F. Coston appeals the Judgment and Sentence on Felony entered on April 2, 2010, in King County Superior Court cause number 09-1-06250-8, the Honorable Theresa Doyle presiding.

Coston was charged with the crimes of Promoting Prostitution in the First Degree (Attempted) and Assault in the Second Degree— Domestic Violence based on events allegedly occurring between June 24 and June 26, 2009.¹ Coston was further charged with three counts of Witness Tampering based on events that occurred after he was arrested on October 1, 2009.² In addition to these substantive criminal charges, the State also alleged rapid recidivism, an aggravating factor for exceptional sentencing under RCW 9.94A.535(3)(t).³ Coston had been released from the Clallam Bay Correctional Facility on June 23, 2009.⁴

State v. Coston was called for trial on February 24, 2010. In pretrial motions the defense sought to exclude all evidence of Coston's recent incarceration at Clallam Bay, as any such evidence was likely to be highly prejudicial to the jury.⁵ In particular, the defense sought to exclude

¹ Amended Information, February 24, 2010, Clerk's Papers ("CP") at 6-8.

² *Id.*

³ *Id.*

⁴ Findings of Fact and Conclusions of Law, April 2, 2010, CP at 81-85.

⁵ Defendant's Trial Brief, CP at 11-14.

State's Exhibit 8, a stack of prison letters from Coston to his alleged victim, Ms. Jordyn Burdick.⁶

Judge Doyle made a pretrial determination that Exhibit 8 was admissible, although she did order several redactions for the purpose of sanitizing the exhibit.⁷

At trial, the complaining witness read excerpts from Exhibit 8 to the jury and offered her interpretation of the words contained in the letters. Ms. Burdick also offered other testimony at trial from which the jury almost certainly inferred that Coston was released from prison shortly before the events giving rise to the criminal charges.

Coston was convicted by a jury of all counts on March 9, 2010.⁸ The jury was given neither a domestic relationship instruction nor a domestic relationship verdict form.⁹

Coston appeals the jury verdict on the grounds that the trial court's evidentiary rulings deprived him of a fair trial due to the highly prejudicial impact of the incarceration evidence. Coston also appeals the Judgment and Sentence on the grounds that the conviction for Assault in the Second Degree (Domestic Violence) is not factually supported as the jury made no

⁶ Exhibit List, CP at 35-37.

⁷ Report of Proceedings ("RP"), February 25, 2010 at ____.

⁸ Verdict Forms, CP at 38, 39, 68, 69, 70.

⁹ Jury Instructions, CP at 40-67.

determination that a domestic relationship existed between Coston and Burdick.

Based on these errors, Eric Coston respectfully requests that this Court vacate the convictions entered below and remand the case for a new trial.

ASSIGNMENTS OF ERROR

FIRST ASSIGNMENT OF ERROR

The trial court erred when it denied the defendant's motion *in limine* to exclude Exhibit 8, the letters written from prison by Eric Coston to Jordyn Burdick.

SECOND ASSIGNMENT OF ERRO

The trial court erred when it denied defendant's first motion for a mistrial.

THIRD ASSIGNMENT OF ERROR

The trial court erred when it found Coston guilty of Assault in the Second Degree (Domestic Violence) when the jury had not been given an instruction on domestic relationships and did not return a verdict on the issue of whether a domestic relationship existed between Coston and Burdick.

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STATEMENT OF THE CASE

Eric Coston met Jordyn Burdick in 1999 when Coston was an inmate at the Green Hill Juvenile Correctional Facility in Chehalis, Washington and Burdick was employed on the staff of the same facility. The two developed a romantic relationship while Coston was incarcerated, and Burdick's employment at Green Hill was terminated shortly thereafter.¹⁰

On February 6, 2004, Eric Coston was sentenced to a prison term of 95 months for Robbery in the Second Degree by the King County Superior Court, cause number 03-1-08299-2.

While Coston was serving this sentence, Burdick contacted him for the purpose of rekindling their relationship. Beginning in November, 2008, the couple started exchanging letters and phone calls.¹¹ Burdick saved the letters sent to her from Clallam Bay by Coston.¹² Between November 1, 2008 and June 23, 2009, Coston wrote at least 30 letters to Burdick in longhand.

¹⁰ Burdick testified that she had known Coston for about 10 years. Report of Proceedings ("RP"), March 3, 2010, 4:1. The defense did not seek to introduce evidence of the relationship at Green Hill.

¹¹ *Id.* at 4:16.

¹² *Id.* at 5:8-10.

On June 22, 2009, Burdick travelled to Monroe, Washington, to borrow a car from Eric Coston's grandmother, Jean Klum.¹³ She drove that night to Clallam Bay and met Eric Coston there when he was released from prison.¹⁴ The two then returned to the Seattle area.¹⁵

The trial focused on disputed events occurring between June 24 and June 26, 2009. Jordyn Burdick testified that Coston had taken her to a motel on Aurora Avenue in Seattle for the purpose of forcing her into prostitution and had assaulted her when she refused to "walk the track" on Aurora.¹⁶ The defense theory of the case was that Coston and Burdick had parted ways no later than June 24, 2009, and that Burdick, who was staying alone on Aurora Avenue, was assaulted by another man. However, Coston did not testify to this theory at trial.

On Saturday, June 27, 2009, Coston drove Burdick to Monroe, where she was given a place to stay with his grandmother, Jean Klum.¹⁷ Burdick left Monroe on June 29, 2009 and subsequently obtained medical care and filed a police report.¹⁸

Coston was arrested on October 1, 2009. The witness tampering charges in this case arose from Coston's recorded telephone calls from the

¹³ *Id.* at 20:12-15.

¹⁴ *Id.* at 21:6.

¹⁵ *Id.* at 21:12.

¹⁶ *Id.* at 23:13-30:7.

¹⁷ *Id.* at 33:9-10.

¹⁸ *Id.* at 42:12-3.

King County Jail.¹⁹ The defense tried unsuccessfully to have the witness tampering charges severed from the Promoting Prostitution and Assault charges. That pretrial ruling is not appealed here.

State v. Coston was assigned to the Honorable Theresa Doyle and called to trial on February 24, 2010. Both parties submitted trial briefs.

Many of the pretrial motions were not controversial. However, the defense brought two motions that directly relate to this appeal. First, the defense sought to exclude all evidence of Coston's incarceration at Clallam Bay due to lack of relevance on the one hand, and undue prejudice on the other.²⁰ Second, and closely related, the defense also sought to exclude all of Coston's prison letters to Jordyn Burdick.²¹

The defense motion to exclude evidence of Coston's incarceration rested heavily on RCW 9.94A.537(4), which sets forth a procedure for having the jury deal separately with an allegation of rapid recidivism. Even the Legislature, which is hardly biased in favor of criminal defendants, recognizes how prejudicial evidence of rapid recidivism is in a criminal case.

In oral argument, Coston's counsel argued that "if the jury hears that this is alleged to have happened the day after he is out of Clallam Bay,

¹⁹ Amended Information, CP at 6-8.

²⁰ Defendant's Trial Brief, CP at 13-14.

²¹ *Id.*

there is no way he can get a fair trial. And the statute recognizes that, Your Honor.”²² Judge Doyle also agreed that such evidence would be highly prejudicial.²³

The defense motion to exclude the Coston letters relied on the fact that the letters, **regardless of their content**, would strongly encourage an inference that Coston was incarcerated at the time he wrote the letters. This is due in part to the fact that *nobody writes letters anymore*, except prison inmates. Thus, a stack of handwritten letters veritably screams “prison!” to the jury.

The State opposed both defense motions. With respect to the motion to exclude evidence of Coston’s incarceration, the State argued that the evidence went to the *res gestae* of the crimes charged and was therefore properly included in the State’s case in chief under RCW 9.94A.537(4).²⁴ With respect to the disputed letters, the State argued that the letters established a relationship between Coston and Burdick and, further, established a pattern of “grooming” the victim.²⁵

In response to the defense motions, Judge Doyle issued two rulings on February 25, 2010, that are difficult, if not impossible, to reconcile. First, Judge Doyle ruled that the aggravating factor of rapid recidivism

²² RP. February 24, 2009, at 30:19-22.

²³ *Id.* at 36:6-7.

²⁴ *Id.* at 32:11-13.

²⁵ *Id.* at 32:15-17.

would be tried separately pursuant to RCW 9.94A.537(4).²⁶ Second, with respect to the letters, Judge Doyle ruled that the entire stack would be admissible, subject to redaction of the passages dealing specifically with prison and prison life.²⁷ At a separate hearing on March 3, 2010, Judge Doyle ruled on various proposed redactions to the letters. Those rulings are not appealed here. Instead, we argue that redactions were an inadequate and inappropriate solution to the problem presented by the letters. Indeed, the very fact the letters were heavily redacted likely reinforced the jury's inevitable conclusion that they were written from prison.

At trial, Jordyn Burdick testified that she and Coston had engaged in a long distance romance in early 2009, with handwritten letters as the primary form of communication.²⁸ Given the ubiquity of both automobiles and the internet, these facts alone would tell the jury that there was something highly unusual about the relationship. From there, it would be a very short leap for the jury to reach the conclusion that Coston had written the letters from prison.

²⁶ RP, February 25, 2010, at 2:10-3:5.

²⁷ *Id.* at 3:6-4:27.

²⁸ RP, March 3, 2010 at 4:13-5:4.

As she testified, Burdick was handed a large stack of letters, Exhibit 8, by prosecutor Christina Miyamasu.²⁹ Ms. Miyamasu elicited testimony regarding six of the letters.

Ms. Burdick testified that the March 12, 2009 letter contained a discussion of a seventeen year old girl joining Coston and Burdick as a member of their “family.”³⁰

Ms. Burdick then turned to the letter of March 14, 2009. In this letter, Coston discussed his determination to make money. He also discussed the possibility that Burdick might support the family by “dancing,” i.e., stripping, for a money.³¹

From the March 26, 2009 letter, Burdick read a paragraph discussing another woman, “Trisha,” who had expressed an interest in prostitution. Coston indicated that he had not communicated with Trisha in some months and that she might have “chosen up” with someone else.³²

From the April 1, 2009 letter, Burdick read Coston’s reaction to some photographs of women that Burdick had sent him in prison.³³

²⁹ RP, March 3, 2010, at 5:24.

³⁰ *Id.* at 6:22-10:3.

³¹ *Id.* at 10:4-12:3.

³² *Id.* at 12:5-13:5.

³³ *Id.* at 13:6-14:25.

From the April 5, 2009 letter, Burdick read language wherein Coston expresses a desire to “hustle,” but does not disclose the nature of the hustle being discussed.³⁴

Finally, from the April 6, 2009 letter, Burdick read passages where Coston described the attitude necessary for success in Burdick’s future profession. Coston also described a woman who was making \$60,000 a month for her work and expressed a belief that Burdick could top that figure.³⁵

After discussing the letters, Ms. Miyamasu asked Ms. Burdick, “And did you have plans to see the defendant in person later that summer?” Ms. Burdick responded, “Yes.”³⁶

Ms. Burdick then went on to describe how she borrowed a car in Monroe on June 22, 2010, and drove overnight to pick up Eric Coston the next day.³⁷

During trial, the defense twice moved for a mistrial on the basis that evidence of Coston’s incarceration had impermissibly permeated the proceedings.³⁸ On March 4, 2010, counsel argued, unsuccessfully, “I

³⁴ *Id.* at 15:1-17:6.

³⁵ *Id.* at 17:7-19:3. We do not believe Coston was discussing prostitution here.

³⁶ *Id.* at 19:11-13.

³⁷ *Id.* at 20:1-21:9.

³⁸ *Id.* at 48:19-22; RP, March 4, 2010 at 114. Coston does not appeal the denial of the motions for mistrial as the argument would be redundant to the arguments made on the recidivism evidence.

believe every member of the jury knows my client was in prison last June.”³⁹

After the completion of testimony and closing arguments, *State v. Coston* was sent to the jury on March 9, 2010. The jury was not given an instruction on the definition of “domestic relationship,”⁴⁰ nor was the jury given a verdict form on the issue of whether such a relationship existed between Coston and Burdick. The jury returned five guilty verdicts the same day.

Eric Coston was sentenced on April 2, 2010. The Judgment and Sentence on Felony included a finding that a jury had found Coston guilty of Assault in the Second Degree—Domestic Violence.⁴¹

Coston was sentenced to 90 months for Promoting Prostitution (Attempted), 84 months for Assault in the Second Degree—Domestic Violence, and 60 months for each count of Witness Tampering, with all terms running concurrently.⁴² The court also added 30 months due to the rapid recidivism aggravator, giving Coston consecutive terms of 90 months and 30 months.⁴³

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³⁹ RP, March 4, 2010, at 114:12-14.

⁴⁰ Jury Instructions, CP at 40-67.

⁴¹ Judgment and Sentence on Felony, p.1, CP at 71.

⁴² *Id.* at 4, CP at 74.

⁴³ *Id.*

ARGUMENT

1. Standard of Review.

The trial court's rulings on motions *in limine* are reviewed for an abuse of discretion. *State v. Rehak*, 67 Wn.App. 157, 162, 834 P.2d 651 (1992). A trial court's denial of a motion for a mistrial is also reviewed for abuse of discretion. *State v. Hopson*, 113 Wn.2d 273,284, 778 P.2d 1014 (1989) An abuse of discretion occurs if the ruling was 'manifestly unreasonable' or based on 'untenable grounds.' *State v. Finch*, 137 Wash.2d 792, 810, 975 P.2d 967 (1999). The appellant bears the burden of proving abuse of discretion. *State v. Demery*, 144 Wash.2d 753, 758, 30 P.3d 1278 (2001).

While there are several Washington cases that discuss discrepancies between general and special verdicts, there does not appear to be a reported case where the judgment entered by the court exceeds the scope of the jury verdict, and where the jury has not found an element of the offense. We believe this is an error of law subject to *de novo* review.

2. The Trial Court abused its discretion by admitting Coston's prison letters, Exhibit 8, into evidence.

It is hard to imagine evidence more prejudicial to a defendant than evidence that the alleged crime occurred the day after the defendant was

released from prison. Evidence of this nature was admitted below and its impact on the trial was poisonous.

The Legislature has recognized the prejudicial effect of evidence regarding rapid recidivism by establishing a procedure whereby evidence of rapid recidivism is presented to the jury only after there has been a finding of guilt. RCW 9.94A.537(4). The statute contains exceptions, but none of those exceptions apply in this case.

Not only has the Legislature recognized that evidence of this nature should not be placed before the jury, Judge Doyle herself acknowledged that evidence of rapid recidivism would be highly prejudicial. In spite of that, evidence from which the jury must certainly have inferred that Eric Coston was released from Clallam Bay on June 23, 2009 was admitted at trial.

We believe the trial court attempted to walk too fine a line: on the one hand it wanted to exclude evidence of rapid recidivism, on the other it chose to admit what were obviously prison letters. Put another way, the court attempted to achieve two contradictory goals; it should have chosen one or the other as it could not have both.

We would ask this Court to consider Exhibit 8 in conjunction with Jordyn Burdick's testimony that she was engaged in a long distance relationship with Eric Coston and planned to see him face-to-face several

months later. With or without redactions, we believe there is a 100% likelihood that a reasonable person would conclude that these letters were written from prison. From this it is also inescapable that the jurors would conclude that the alleged crimes were committed within one or two days of Coston's release. Indeed, given this evidence, it is inconceivable that the jury could have concluded otherwise.

If this Court finds that the jury likely inferred rapid recidivism, it should also find that the prejudice was severe and far exceeded any probative value that might be found under an ER 404(b) balancing test.

3. The trial court abused its discretion when it denied the defendant's motion for a mistrial during the testimony of Jordyn Burdick.

The argument echoes the argument set forth in the previous section. Judge Doyle had ruled that the issue of the rapid recidivism aggravator would be tried separately, but by the time Jordyn Burdick finished testifying, a separate trial was no longer necessary. Based on the letters in Exhibit 8 and her testimony regarding the nature of the relationship with Eric Coston, the jury absolutely must have known that Coston was released from prison just a day or two prior to the alleged crimes. To deny a mistrial under these circumstances was manifestly unjust and an abuse of discretion.

4. The trial court committed an error of law when it entered a judgment of guilty on count II, which alleged Assault II (Domestic Violence), as the jury did not find the existence of a domestic relationship between Jordyn Burdick and Eric Coston.

It is axiomatic that judgments must be supported by facts, whether found by a jury or by a judge presiding over a bench trial. Here, the trial court entered a judgment that was not supported by facts.

The State charged Coston with Assault in the Second Degree—Domestic Violence and the trial court entered a judgment of guilt on the charge. Where domestic violence is alleged, the State must prove the existence of a domestic relationship as an element of the crime. RCW 10.99.020.

There does not appear to be a reported Washington case addressing a situation where a court has entered a judgment of guilty on a domestic violence offense in the absence of a jury finding that a “household or family member” relationship existed between the offender and the victim. Absent such case law, we believe this case would be analogous to a situation where a judge, after a bench trial, enters a verdict without entering findings of fact. Where that happens, the proper remedy is vacation of the judgment and remand for a new trial. *State v. Edwards*, 3 Wash.App. 638, 639, 477 P.2d 28 (1970).

CONCLUSION

Once upon a time, courtships were carried on by way of handwritten letters. Those days are ancient history. In 2010 the only people who write letters to a long distance lover less than 200 miles away are prison inmates. Placing a stack of prison letters in front of a jury is so prejudicial that the prejudice cannot possibly be cured by selective redactions. The letters, when combined with Jordyn Burdick's testimony, left no doubt that Eric Coston had been released from prison on June 23, 2009. Coston can only receive a fair trial if this evidence is excluded and the State is forced to present its case without the use of such prejudicial evidence.

In addition, the entry of judgment against Coston for Assault in the Second Degree—Domestic Violence was done in error as there was no finding of fact that a qualifying relationship existed between Eric Coston and Jordyn Burdick. This is an error that can only be remedied by a grant of a new trial.

Respectfully submitted this the 13 day of December, 2010.



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DECLARATION OF SERVICE

I, Lee H. Rousso, declare that on December 13, 2010, I served a copy of Appellant's Opening Brief on the King County Prosecuting Attorney's Office by depositing a copy of same in the United States Mail, first class postage prepaid, to:

King County Prosecuting Attorney's Office
516 Third Avenue, W554
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I declare under penalty of perjury under the laws of the state of Washington that the foregoing declaration is true and correct.

Dated this the 13th day of December, 2010.



Lee H. Rousso