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

STATE OF WASHINGTON,)	
)	
Respondent,)	C.O.A. Cause No. 65308-3-I
)	
v.)	
)	STATEMENT OF ADDITIONAL
ERIC FRANKLIN COSTON,)	GROUND FOR REVIEW
)	
Appellant.)	
)	
)	

I Eric Franklin Coston, have received the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

ADDITIONAL GROUND ONE

Not severing the Witness Tampering charges prejudiced Coston and denied him a fair trial.

FACTS IN SUPPORT OF GROUND ONE:

On February 24th, 2010, the State improperly motioned to Amend the Information to include three new counts of witness tampering (RP 02/24/2010 pg.6). Defense Counsel, Lee H. Rousso, properly objected to adding the witness tampering charges (RP 02/24/2010 pg.7), pointing out to the trial court that these charges ask the jury to consider a completely separate set of facts, and it included extremely prejudicial evidence (RP 02/24/2010 pg.7).

ARGUMENT IN SUPPORT OF GROUND ONE:

The trial court's reliance on it being the Defendant's burden to demonstrate that the prejudice outweighs the concern for judicial economy in denying Coston's Motion to Sever was very misplaced as the Court did not weigh all of the obvious highly prejudicial evidence (RP 02/24/2010 pg.13). This evidence was so inflammatory it overwhelmed the jury with Coston's propensity to commit crimes and inferred guilt that Coston would of been found guilty of any crime that he was charged, innocent or not.

The Federal and State Constitutions guarantee all defendants a fair trial, untainted from prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). As part of this right to a fair trial, a defendant is entitled to a severance of counts if the joinder of the counts is "so manifestly prejudicial as to outweigh the concern for judicial economy." *State v. Hoffman*, 116 Wn.2d 51, 804 P.2d 577 (1991). Under such circumstances in which the unfair prejudice outweighs the concern for judicial economy, the failure to grant a motion to sever requires reversal unless the state can prove that the error was harmless beyond a reasonable doubt. *State v. Mitchell*, 117 Wn.2d 521, 817 P.2d 898 (1991).

In determining whether or not the trial court's refusal to grant a severance of counts denied the Defendant the right to a fair trial, the Court considers the following factors: Factors that tend to mitigate any prejudice from a joinder of counts include; (1) the strength of the State's evidence on each of the counts; (2) the clarity of the defenses on each count; (3) the propriety of the trial court's instruction to the jury regarding the consideration of evidence of each count separately; and (4) the admissibility of the evidence of the other crime. *Watkins*, 53 Wn.App. at 269, 766 P.2d 484; *State v. Gatalski*, 40 Wn.App. 601, 606-07, 699 P.2d 804, review denied, 104 Wn.2d 1019 (1985). These same factors are applied by reviewing courts to determine if a trial court's denial of a severance motion was unduly

prejudicial. State v. Eastabrook, 58 Wn.App. 805, 812, 795 P.2d 151, review denied, 115 Wn.2d 1031, 803 P.2d 325 (1990); State v. Cotton, 75 Wn.App. 669, 687, 879 P.2d 971 (1994).

As the Court instructs in State v. Cotton, the First factor to consider when evaluating the trial court's refusal to sever counts is "the strength of the State's evidence on each count". In Coston's case, the State's evidence is stronger on the three new Witness Tampering counts than it is on the Attempted Promoting Prostitution. The evidence of the Attempted Promoting Prostitution is based on Coston suggesting that Burdick make money "stripping". The undisputable recorded jail conversations of witness tampering are so very prejudicial that the axiom of fundamental fairness cannot happen, as "stripping" equates to prostitution because of Coston's propensity to commit crimes does outweigh everything.

The second Factor is the clarity of defenses on each count. Coston maintains that promoting prostitution did not occur. Promoting "stripping" yes, prostitution no. Coston's defense was of general denial. This defense is not the same in the witness tampering charges. Because the counts were not severed it was impossible for the jury to independently review the evidence in just the Promoting Prostitution charge and give Coston a fair trial.

The third Factor is "the propriety of the trial court's instruction to the jury regarding the consideration of evidence of each count separately. Being told that "your verdict on one count should not control your verdict on any other count" does not wash away the taint from the three counts of witness tampering on the Promoting Prostitution charge. The deficiency in the Court's jury instruction centers on its failure to advise what evidence can be used on each charge. It would be nearly impossible for almost any juror to ignore the Witness Tampering evidence when considering the Defendants general defense.

The fourth Factor the Court should consider in determining the issue of severance of counts is "the admissibility of the evidence of the other crimes." Witness Tampering is generally severed as a rule. It is fundamentally under our justice system that "propensity" evidence, is not admissible to prove the commission of a new offense. ER 404(b). The rule likewise excludes acts that are merely unpopular or disgraceful. These last minute, amended charges of Witness Tampering should have been severed to afford Coston due process and a fair trial.

ADDITIONAL GROUND TWO

Not bifurcating the Rapid Recidivism aggravating factors from the charges at trial denied Coston a fair trial.

FACTS IN SUPPORT OF GROUND TWO:

On February 24th, 2010, Coston moved the Court to "bar all evidence of Rapid Recidivism as such evidence is presumed by statute to be prejudicial to the defendant" (RP 02/24/2010 pg. 24). Defense counsel Rousso made a significant showing of how badly Coston would be prejudiced if this was not barred, and that the jury would hear the crime was to allegedly to have happened the day after Coston is let out of the prison at Clallam Bay, Washington (RP 02/24/2010 pg.25). Rousso continued, "I think the biggest factor of all is the prejudicial value, your honor. Its just extreme. if the jury hears that this occurred on the way home from prison, or shortly thereafter, he's not going to get a fair trial. The Court: I tend to agree with you (RP 02/24/2010 pg.27).

ARGUMENT IN SUPPORT OF GROUND TWO:

Coston argues that he had a right to a bifurcated trial. Questions of law are reviewed De Novo. State v. Benn, 161 Wn.2d 256, 262, 165 P.3d 1232 (2007). A trial court's decision of bifurcation is generally reviewed for an abuse of discretion. State v. Monschke, 133 Wn.App. 313, 335, 135 P.3d 966 (2006) (citing State v. Jefferson, 55 Wn.App. 231, 236, 776 P.2d 1372 (1989)); State v. Roswell, 165 Wn.2d 186 (2008). When defense counsel Rousso explained of the statute's normally being bifurcated and the prejudice Coston would suffer, if the Rapid

recidivism exception was not, the trial court erred in its discretion. The trial court agreed that not bifurcating the Rapid Recidivism would prevent Coston from getting a fair trial.

Just getting out of prison for prior crimes and having the jury consider that in determining the innocence or guilt of the current charges is overwhelmingly prejudicial. Evidence of prior felony convictions is generally inadmissible against a defendant because it is not relevant to the question of guilt yet very prejudicial, as it may lead the jury to believe the defendant has a propensity to commit crimes. *State v. Hardy*, 133 Wn.2d 701, 706, 946 P.2d 1175 (1997).

The trial did not measure the probative value versus the prejudicial effect as required. Not preventing the jury from hearing this prejudicial evidence allowed the State to imply the "Defendant is guilty because he or she is a criminal type person who would be likely to commit the crime charged". *State v. Ryna Ra*, 144 Wn.App. 688, 175 P.3d 609 (2008).

The trial court ruled that for the sake of "judicial economy" that Rapid Recidivism should not be bifurcated. This, was uncurable prejudice. Judicial economy is not an issue compared to the constitutional implications of due process being ignored. Our State Supreme Court has held that "bifurcation is possible even with thousands of juries spread throughout the

state", when it compared the judicial economy standard versus fair trial. *Sitton v. State Farm Mut. Auto. Ins.*, 165 Wn.2d 186 (2003). Coston's Rapid Recidivism factor should have been bifurcated.

ADDITIONAL GROUND THREE

Not providing Coston notice of the aggravating factor for an exceptional sentence for Rapid Recidivism is contrary to the Legislative intent for RCW 9.94A.535(3)(t), and defeats the laws purpose.

FACTS IN SUPPORT OF GROUND THREE:

Coston was released from the Clallam Bay Correction Center on June 23rd, 2009 (RP 02/24/2010 pg.25). Prior to, and upon the day of release, Coston was never informed or made aware, that if he committed a felony shortly after his release, that he would receive an exceptional sentence. None of the pre-release papers reflected this. At most, only one percent of the entire prison population in Washington state know of this exceptional sentence.

ARGUMENT IN SUPPORT OF GROUND THREE:

RCW 9.94A.535, was amended by 2008 c. 233 §9 and by 2008 c. 276 §303. To date, the Washington State Department of Corrections

has not added this notice to the conditions of release papers one must sign to be released. No notice has been posted in any prison in Washington state, and prisoners as a whole are clueless and blissfully unaware of this statutes existence.

This statute was enacted to stop the rapid flow of recidivism. The Legislative intent and wisdom of the lawmakers was to warn prisoners being released that if they commit a crime immediately after release while on Community Custody, that they would pay the price of a steep exceptional sentence. This was done to save the state money and deter crime. It accomplishes neither if prisoners are not aware, and inflicts excessive and arbitrary punishment for no purpose.

A manifest injustice occurs if Coston is given a sentence contrary to the purpose the legislature intended. Overturning Coston's exceptional Rapid Recidivism sentence would serve judicial clarity and correct a manifest injustice. It would also save the state millions deterring crime and force the Department of Corrections to do their part to follow the legislative intent, as they would provide notice.

"A special relationship" between the actor and the third person "imposes a duty upon the actor to control the third person's conduct". Taggart v. State, 118 Wn.2d 195, 218 (1992).

The Washington State Department of Corrections was negligent in not following the Legislative intent and warning Coston of the Rapid Recidivism exceptional sentence jeopardy.

Statutes that impose criminal liability for the omission of a legally required performance are held to a higher standard of notice than other statutory criminal proscriptions. *State v. Chester*, 82 Wn.App. 422 (1996).

The primary purpose of a statute is "giving effect to Legislative intent". *Guijosa v. Wal-Mart Stores*, 101 Wn.App. 777 (2002). It serves no purpose to impose a sentence upon someone to stop them from committing behavior they are forewarned about, when they are not given any warning. This is contrary to the Legislative intent of the Rapid Recidivism statute. The conviction should be overturned if gained by ill-gotten means "contrary to Legislative intent". *Skamania County v. Woodall*, 104 Wn.App. 525 (2001).

Prior to an action which will effect an interest in life, liberty or property protected by the Due Process clause, notice must be provided which is "reasonably calculated, under all the circumstances, to appraise interested parties of the pendency of the action and afford them an opportunity to present their objections". *Mullane v. Central Hanover Bank & Trust Co.*, 339

U.S. 306, 94 L.Ed. 855, 70 S.Ct. 652 (1950). The Due Process Vagueness Doctrine under the Fourteenth Amendment and Const. Art. 1 §3, entitles citizens to fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739 (2008).

Coston had no warning of this proscribed conduct that carried such a stiff sentence. The Department of Corrections was negligent when it failed to give all prisoners warnings when they are released. State v. Ferrer, 136 Wn.2d 103 (1996). Due process requires notice reasonably calculated to appraise a party of proceedings that will effect him. Olympic Forest Prods., Inc. v. Chaussee Corp., 82 Wn.2d 418 (1973). Actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty interests of any party. Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 800, 103 S.Ct. 2706, 77 L.Ed.2d

ADDITIONAL GROUND FOUR

Coston was presented with a Hobson's Choice, which denied him due process and a fair trial.

FACTS IN SUPPORT OF GROUND FOUR:

On February 24th, 2010, Coston started his trial. The parties are here for trial" (RP 02/24/2010 pg.2). The prosecutor, Christina Miyamasu, moved to amend the Information (RP 02/24/2010

pg.2). The Deputy Prosecutor, Christina Miyamasu, moved to Amend the Information (RP 02/24/2010 pg.6). Four new charges were added to which defense counsel Lee H. Rousso, duly and properly objected to (RP 02/24/2010 pg.7). The defense had no time to prepare or investigate as the jury was picked the next day (RP 02/24/2010 pg.36). The original Indictment had three total counts. The Amended Information upped the ante to seven counts (RP 02/24/2010 pg.6-7).

ARGUMENT IN SUPPORT OF GROUND FOUR:

Prejudice occurred because Coston was found guilty of all the charges in the Amended Information he was not prepared to defend against. Coston had the classical Hobson's Choice, to request a continuance under these new weighty circumstances, or sacrifice his right to be represented by counsel who had sufficient opportunity to adequately prepare a material part of his defense, may be impermissibly prejudiced. Such unexcused conduct by the State cannot force a defendant to choose between these rights. State v. Price, 94 Wn.2d , 814.

Waiting until the last possible moment to charge Coston with additional charges combined with the unavailability and purposely late disclosure of discovery forced a Hobson's Choice. Reversal is required. State v. Ramos, 83 Wn.App. 622, 623, 922 P.2d 193 (1996).

ADDITIONAL GROUND FIVE

Coston was denied his right to full confrontation against the sole eye witness against him regarding competency at the time of the crime, motive to lie, and deals made.

FACTS IN SUPPORT OF GROUND FIVE:

The sole eye witness, Ms. Burdick, was made unavailable to the defense to interview beyond the one very brief initial prior in the prosecutor's office. After investigating what Burdick had said, the defense was not allowed to interview her in the months prior to trial for impeachment purposes of the facts that they had gleaned regarding her drug use and mental competency. The State had to ask for a warrant to obtain Burdick from the the Sundown Treatment Center in Yakima, so Burdick could appear for them at trial (RP 02/24/2010 pg.5).

Defense counsel made the court aware of Burdick's extensive mental health and heavy drug abuse history. Defense counsel asked to be allowed impeachment evidence reflecting Burdick's drug use influence the day of the crime (RP 02/24/2010 pg.21). Rousso painfully painted a picture of Burdick's drug use statements that conflicted and proved her not to be a credible witness (RP 02/24/2010 pg.22). The court granted the State's motion to preclude the

defense from raising drug use (RP 02/24/2010 pg.22).

ARGUMENT IN SUPPORT OF GROUND FIVE:

Coston was denied to fully confront the sole eye witness against him. Burdick's drug impeachment evidence was crucial to determining her credibility. Because defense attorney Rousso laid the proper foundation with the trial court to request that he be (1) able to impeach Burdick with her prior statement of "not using drugs" when evidence proved she was forced into an inpatient drug program for her continued usage, and (2) that Burdick was heavily under the influence of opiates and other illegal narcotics when the actual crime occurred, relating to her truthfulness and actual mental competency.

The trial court should of allowed Burdick's obvious lie about her drug usage should have been allowed to show Burdick's propensity to lie regarding the charges and her relationship with Coston. The trial court should of allowed the defense some latitude to explore Burdick's drug impairment at the time of the crime to facilitate impeachment. A criminal defendant has a right to confront witnesses against him. *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *State v. Orndorff*, 122 Wn. App. 781, 95 P.3d 406(2004); *State v. Spencer*, 111 Wn.App. 401, 45 P.3d 209 (2002). The United States and Washington State

Constitutions guarantee defendants the right to confront and cross-examine adverse witnesses. United States Const. Amend. VI; Washington Const. Art. 1 § 22; *State v. McDaniel*, 83 Wn.App. 179, 185, 920 P.2d 1218 (1996).

Because the State's whole case relied on Burdick's testimony in chief, Coston should have been allowed to fully cross examine her, especially her competency. The more essential the witness is to the State's case, the more latitude the trial court should give to the defense to explore fundamental elements, such as motive, bias, credibility, or foundation. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). It is fundamental that a defendant charged with the commission of a crime should be given great latitude in the cross-examination of prosecuting witnesses to show motive or credibility. *State v. Wilder*, 4 Wn.App. 850, 854, 486 P.2d 319 (1971).

The trial court's ruling prohibiting Coston to inquire into Burdick's drug use and state of mind during the incident was an abuse of discretion. Not inquiring prevented Coston a fair trial and his ability to defend himself. A criminal defendant has the the right to present a defense. *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). The goal of the Confrontation Clause is to allow reliability of the accuser to be assessed through

cross-examination. Crawford v. Washington, 541 U.S. 36, 61, 124
S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Dated: February 22nd, 2010.

Signed: 

Eric Franklin Coston
Washington State Penitentiary
1313 North 13th Avenue
WallaWalla, Washington 99362

STATE OF WASHINGTON,)
RESPONDENT,)
V.)
ERIC FRANKLIN COSTON,)
DEFENDANT.)

NO. 65308-3-I

AFFIDAVIT OF SERVICE
BY MAILING

I, ERIC FRANKLIN COSTON, being first sworn upon oath, do hereby certify that I
have served the following documents: STATEMENT OF ADDITIONAL GROUNDS

Upon: KING COUNTY DEPUTY PROSECUTOR CHRISTINA MIYAMASU
KING COUNTY PROSECUTOR'S OFFICE
516 THIRD AVENUE
SEATTLE, WASHINGTON 98104

By placing same in the United States mail at:

WASHINGTON STATE PENITENTIARY
1313 NORTH 13TH AVENUE
WALLA WALLA, WA. 99362

On this 23 day of February, 2011.


Name & Number

2011 MAR -2 09:10:02

#864775

Affidavit pursuant to 28 U.S.C. 1746, Dickerson v. Wainwright 626 F.2d 1184 (1980); Affidavit sworn
as true and correct under penalty of perjury and has full force of law and does not have to be verified
by Notary Public.

DEAR COURT CLERK,

PLEASE FIND AND FILE
THE ENCLOSE STATEMENT OF
ADDITIONAL GROUNDS.

THANK YOU,

2011 MAR -2 AM 10:02