69307-7

REC'D
JUN 07 2013
King County Prosecutor
Appellate Unit

69307-7

NO. 69307-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

ANTWAN RECHE,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 JUN -7 PM 4:36

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

The Honorable Monica Benton, Judge

REPLY BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

Page

A. ARGUMENT IN REPLY 1

1. THE EXCLUSION OF EVIDENCE RELEVANT TO RECHE'S DEFENSE REQUIRES REVERSAL OF HIS CONVICTIONS. 1

2. IN ADDITION TO VIOLATING THE PRINCIPLE FROM STATE V. MELICK, DUAL CONVICTIONS FOR ROBBERY AND POSSESSION OF THE STOLEN ITEM VIOLATE DOUBLE JEOPARDY. 6

D. CONCLUSION 8

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Burri
87 Wn.2d 175, 550 P.2d 507 (1976) 1

State v. Calle
125 Wn.2d 769, 888 P.2d 155 (1995) 6, 7

State v. Gohl
109 Wn. App. 817, 37 P.3d 293 (2001) 6

State v. Hudlow
99 Wn.2d 1, 459 P.2d 514 (1983) 1, 3, 4

State v. Johnson
90 Wn. App. 54, 950 P.2d 981 (1998) 2

State v. Jones
168 Wn.2d 713, 230 P.3d 576 (2010) 2, 4, 5

State v. Maupin
128 Wn.2d 918, 913 P.2d 808 (1996) 1

State v. Melick
131 Wn. App. 835, 129 P.3d 816 (2006) 6, 7

State v. Womac
160 Wn.2d 643, 160 P.3d 40 (2007) 6, 8

Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.
122 Wn.2d 299, 858 P.2d 1054 (1993) 2

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

Blockburger v. United States
284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). 6

RULES, STATUTES AND OTHER AUTHORITIES

ER 801 3

A. ARGUMENT IN REPLY

1. THE EXCLUSION OF EVIDENCE RELEVANT TO RECHE'S DEFENSE REQUIRES REVERSAL OF HIS CONVICTIONS.

When the defense seeks to present evidence, the court must guard his constitutional rights "with meticulous care." State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (quoting State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976)). Once defense evidence is shown to be relevant, the burden shifts to the State to show a compelling interest in excluding it. State v. Hudlow, 99 Wn.2d 1, 15-16, 459 P.2d 514 (1983). The State has shown no such interest here. The trial court's exclusion of the recording of Reche's arrest requires reversal of Reche's convictions for three main reasons. First, the court based its decision in part on improper considerations of credibility and whether the evidence was essential. Second, the record shows neither foundation nor the hearsay rules were an obstacle to admissibility under the rules of evidence, let alone a "compelling interest" warranting exclusion. Finally, the State has not shown that any reasonable juror would have come to the same conclusion if Reche had presented the recording in support of his voluntary intoxication claim.

The trial court's decision to exclude the recordings of Reche's arrest is reversible error because it was based on improper credibility considerations. A trial court abuses its discretion when its decision is based,

even in part, on the wrong legal standard or facts unsupported by the evidence. See Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 344-45, 858 P.2d 1054 (1993). In Fisons, the lower court denied discovery sanctions based "in part" on four incorrect legal rationales. Id. at 344-45. The appellate court also found "many" of the factual bases for the trial court's decision were unsupported by the record. Id. at 345. After elucidating the proper legal standard, the court reversed the denial of sanctions and remanded to determine the appropriate amount. Id. at 356. Here, the State concedes the court improperly allowed credibility determinations to enter into its decision to exclude relevant defense evidence. Brief of Respondent at 15 n.2. This decision was an abuse of discretion because it was based in part on untenable grounds.

The court relied on a second untenable basis when it reasoned the defense could present its case without this evidence. 5RP 91-92. The party with the burden of persuasion has the right to present a continuous story including all the surrounding circumstances, even in the face of an objection that the circumstances are prejudicial. State v. Johnson, 90 Wn. App. 54, 62-63, 950 P.2d 981 (1998). That is even truer of a criminal defendant, whose presentation of relevant evidence may not be limited unless the evidence would "disrupt the fairness of the fact-finding process." State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). Whether the defense could present

its case without the evidence is not the test. The burden is on the State to show why it should be excluded. Hudlow, 99 Wn.2d at 15-16. The State has failed to do so here.

The State's concerns for foundation do not amount to a compelling interest warranting exclusion of relevant defense evidence. See Brief of Respondent at 15. At trial, the prosecutor informed the court that Officer Jones may be able to identify the voices in the video. 5RP 85. Obviously, Reche could identify his own voice. After implicitly acknowledging that the requisite foundation could be laid, the court proceeded to exclude the evidence on grounds unrelated to foundation. RP 85-86. That being the case, defense counsel had no reason to put on specific testimony to prove up the foundation. The mere possibility that, after identifying Reche's voice and those of the officers, there would still remain unidentified voices is not a sufficient compelling interest to warrant interfering with an accused person's right to present a defense.

Even if a mere violation of the evidence rules, without a showing of a compelling interest, were sufficient to exclude this evidence, Reche's statement on the recording that he "didn't take it" is not hearsay because it is not presented for the truth of the matter. ER 801. The defense was not that Reche did not take the car. No part of the defense suggested there might be any reasonable doubt as to whether he took the car. Reche testified he took

the car. 5RP 29-30. The defense was voluntary intoxication, that he did not intend to commit theft or robbery. 6RP 27-35. The mostly incoherent ranting on the recording, including the statement, "I didn't take it," was not presented to show Reche did not take the car. It was, therefore, not hearsay even assuming a mere technical violation of the hearsay rules would be sufficient to warrant excluding relevant defense evidence.

The State also attempts to justify the exclusion because it believes this evidence would not have changed the defense's closing argument. Brief of Respondent at 20-21. This argument also misapprehends the burden. The only hurdle a criminal defendant must surmount to present evidence is that it be minimally relevant. Hudlow, 99 Wn.2d at 15-16. The burden then shifts to the State to provide a compelling interest showing why it should be excluded. Id. Here, the State has not attempted to argue this recording was not relevant. Nor has it attempted to point to any compelling State interest in excluding it. It argues merely that the trial court had discretion under the rules of evidence to exclude it. That is not enough. Jones, 168 Wn.2d at 720. And, as discussed above, the trial court's decision fails to pass muster even under an abuse of discretion standard.

The State argues the exclusion of the recording was harmless because there was other evidence of Reche's intoxication. Brief of Respondent at 17. This argument misses the point. There was also

significant evidence he was feigning the extent of his impairment. 3RP 90, 112, 116-17, 125. Given this credibility question, jurors' ability to hear for themselves what was going on was likely to inform their judgment. Whether defense counsel's closing argument would have been different had the video been presented is completely irrelevant. Exclusion of relevant defense evidence is a serious constitutional error that requires reversal unless the State can prove beyond a reasonable doubt that any reasonable juror would have come to the same conclusion absent the error. Jones, 168 Wn.2d 724. That is not the case here. Hearing Reche's outbursts for themselves would have increased the likelihood the jury would find his extreme intoxication was genuine.

The video of Reche's arrest was relevant and would have assisted the jury in gauging the credibility of his voluntary intoxication defense. The State's brief minimizes the importance of the constitutional right to present evidence in one's defense, the State's burden to show a compelling interest requiring exclusion, and its burden to show the constitutional error was harmless beyond a reasonable doubt.

2. IN ADDITION TO VIOLATING THE PRINCIPLE FROM STATE V. MELICK, DUAL CONVICTIONS FOR ROBBERY AND POSSESSION OF THE STOLEN ITEM VIOLATE DOUBLE JEOPARDY.

Double jeopardy is violated when the same act violates two criminal statutes and it is clear the legislature did not intend to impose dual punishments. State v. Calle, 125 Wn.2d 769, 776-78, 888 P.2d 155 (1995). That is the case here. The legislative intent supporting the principle in State v. Melick, 131 Wn. App. 835, 841, 129 P.3d 816 (2006), that the same person not be punished both for theft and for possession of the item taken, also demonstrates the double jeopardy violation.

Both the State and the Melick court neglected to consider that the Blockburger[1] analysis of whether two offenses are the same in law and fact is a means to an end. Calle, 125 Wn.2d at 778. That end is determining whether the legislature intended to impose dual punishments. Id. When the legislative intent is clear, the Blockburger analysis does not apply. Id. "The same evidence rule controls 'unless there is a clear indication that the legislature did not intend to impose multiple punishment.'" State v. Womac, 160 Wn.2d 643, 652, 160 P.3d 40 (2007) (quoting State v. Gohl, 109 Wn. App. 817, 821, 37 P.3d 293 (2001)). "Both the *Blockburger* and same evidence tests, however, are rules of statutory construction and serve as a means of discerning legislative purpose. They should not be controlling

[1] Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

where there is a clear indication of contrary legislative intent." Calle, 125 Wn.2d at 778. Dual punishment for robbery and possession of the item taken violates double jeopardy because the Legislature did not intend to punish the two offenses separately. Calle, 125 Wn.2d at 78; Melick, 131 Wn. App. at 841.

The State also argues that, because the legislative intent in punishing robbery is slightly different from the legislative intent in punishing possession of a stolen property, there is no double jeopardy violation. Brief of Respondent at 27-28. But the State misapprehends the nature of the legislative intent analysis in double jeopardy. The question is whether the Legislature intended dual punishment. Calle, 125 Wn.2d at 776. It is clear from Melick and the legislative history that it did not. The State concedes that the principle from Melick is "an assurance that a defendant, at least under these facts, will not be targeted for both." Brief of Respondent at 31. That is precisely what makes the dual convictions a double jeopardy violation: the assurance that lawmakers did not intend separate punishments.

The State also suggests the same criminal conduct analysis, which prevents counting the possession conviction as a point in the offender score on the robbery conviction, serves the same purpose as Melick or double jeopardy principles. Brief of Respondent at 22 n.4. It does not. The fact of conviction is punishment in and of itself, regardless of whether that

conviction results in additional confinement time. Womac, 160 Wn.2d at 656-58. The State properly concedes Reche's conviction for possession of a stolen motor vehicle must be vacated under Melick. Brief of Respondent at 21-22. It also must be vacated under double jeopardy, and the same criminal conduct analysis is not a remedy.

D. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, Reche's convictions should be reversed.

DATED this 7th day of June, 2013.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

JENNIFER J. SWEIGERT
WSBA No. 38068
Office ID No. 91051

Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 69307-7-I
	)	
ANTWAN RECHE,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7TH DAY OF JUNE, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ANTWAN RECHE
DOC NO. 359839
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF JUNE, 2013.

x Patrick Mayovsky

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 JUN -7 PM 4:36