73904-2

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NO. 73904-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

CLIFTON E. TURNER,

Appellant.

FILED
Sep 19, 2016
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Division I
State of Washington

BRIEF OF RESPONDENT

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I. ISSUES

(1) When a defendant is charged with sexually abusing a minor, can the court admit lay testimony concerning the victim's subsequent behavior changes?

(2) If this evidence was inadmissible, was the error harmless, where the defense demonstrated alternative explanations for the behavior changes?

(3) The defendant has a long-standing substance abuse problem, but he was not using drugs at the time of the crime. Did the trial court have authority to require him to participate in substance abuse treatment?

(4) If not, could the court still require urinalysis and polygraph examinations to monitor compliance with other conditions of community custody?

(5) If the defendant's appeal is unsuccessful, should the court implement the legislature's determination that he should pay costs resulting from the appeal?

II. STATEMENT OF THE CASE

The defendant, Clifton Turner, met L. when they were both in inpatient drug treatment. 3 RP 344, 347. L. had two daughters: A. (born 7/95) and M. (born 7/98). Because of L.'s ongoing problems

with alcohol and drug abuse, A. and M. lived most of their lives with their aunt D. (L.'s sister). 3 RP 288.

About 2½ years after they meet, the defendant and L. began living together in an apartment in Mountlake Terrace. 3 RP 348-49. In 2012, A. refused to accept the rules at her aunt's house and beginning living with her mother and the defendant. She lived there for a year and a half. 2 RP 212; 3 RP 295. M. visited them about every other weekend. 2 RP 82.

At some point, the defendant began wrestling with M. According to her testimony, his actions became more intrusive over the course of time. At first, he would pull her pants down or pull them up. Later, he began touching her vagina over her pants. Eventually, he pulled her pants down and put his fingers inside her vagina. Finally, he took off his shorts, got her on her knees, and put his penis in her mouth. The last incident occurred in Spring, 2012, prior to M.'s 14th birthday in July. 2 RP 71-91.

M. finally told her sister that the defendant had showed her his private parts and been "creepy" towards her. 2 RP 95. A. insisted on telling their aunt about this. 2 RP 214-15. The aunt, in turn, told their mother, who took M. to the police. 3 RP 300; 2 RP

100. The first report to police occurred on January 24, 2013. 3 RP 270.

The defendant was charged with three counts of second degree child molestation and two counts of second degree rape of a child. CP 136-37. At trial, both M. and her aunt testified about changes in her behavior that began during her sophomore year at school, which was the school year after she disclosed the abuse. She began using marijuana and drinking alcohol almost every day. She also became depressed and suicidal. She was burning and cutting herself. 2 RP 119-203 RP 303-05. The defense objected that this testimony was inadmissible without expert opinion linking it to the abuse. The court overruled that objection. 2 RP 114-17.

On cross-examination of M., the defense brought out other traumatic events that she had experienced. She had seen domestic violence. She had personally experienced physical abuse. She had "been attacked or stabbed or hurt badly." She had seen someone else attacked, stabbed, or hurt badly. She had also been "robbed by threat or with a weapon." 2 RP 174-75.

In his testimony, the defendant admitted wrestling with M. and giving her "wedgies." He admitted that he sometimes continued to wrestle her after she said to stop, but only because she was

"giggling all the time" when she said it. If M. seriously said to stop, he would stop. He denied ever sexually abusing her. 3 RP 368-75.

In the prosecutor's initial closing argument, she did not mention M's behavioral changes. 4 RP 401-409. In defense counsel's argument, she pointed out that M's sister likewise had behavioral problems during her sophomore year. 4 RP 418. The prosecutor responded to this in rebuttal, pointing out that the sister's problems did not occur at the same time. 4 RP 432.

The jury found the defendant guilty of two counts of second degree child molestation. On the third count, it found him not guilty as charged, but guilty of the lesser offense of fourth degree assault. On the two counts of rape of a child, the jury found him not guilty. CP 72-78.

The court sentenced the defendant to a total of 53 months' confinement. It also imposed 36 months' of community custody. CP 30-31. The conditions of community custody including the following:

> 2. Obey all municipal, county, state, tribal and federal laws.
>
> ...
>
> 15. Participate in substance abuse treatment as directed by the supervising Community Corrections Officer.

> 16. Participate in urinalysis, Breathalyzer, and polygraph examinations as directed by the supervising Community Corrections Officer, to monitor compliance with conditions of community custody.

CP 41-42. No objection was raised to any of the conditions. 8/21 RP 29.

III. ARGUMENT

A. ADMITTING EVIDENCE OF THE VICTIM'S BEHAVIOR CHANGES WAS NOT PREJUDICIAL ERROR.

1. A Court Can Properly Admit Lay Testimony Concerning Trauma Suffered By The Victim Of A Sexual Offense.

The defendant raises only one challenge to his conviction. He claims that evidence of the victim's behavioral problems were inadmissible without expert testimony. Contrary to his position, the Supreme Court has upheld lay testimony concerning a rape victim's trauma. State v. Black, 109 Wn.2d 336, 349, 745 P.2d 12 (1987).

In Black, the State offered expert testimony that the victim's behavior fit "a specific profile for rape victims." The Supreme Court held that "expert testimony on rape trauma syndrome is not a scientifically reliable means of proving lack of consent." Id. at 348. This does not, however, preclude the trier of fact from drawing inferences from a rape victim's trauma:

> We do not imply, of course, that evidence of emotional or psychological trauma suffered by a

> complainant after an alleged rape is inadmissible in a rape prosecution. The State is free to offer lay testimony on these matters, and the jury is free to evaluate it as it would any other evidence.

Id. at 349. That is exactly what occurred in this case. The State offered lay testimony on the victim's trauma. The jury was free to consider it for whatever probative value it had.

The defendant claims that evidence of a mental disorder requires expert testimony. Here, however, the State did not offer evidence of any mental disorder. It simply offered evidence that the victim's behavior had changed following the crimes. The idea that stressful events may cause behavioral changes is not beyond common understanding. The trial court properly admitted that evidence.

2. Since The Defendant Was Successful In Showing Other Explanations For The Victim's Behavior Changes, There Is No Reasonable Probability That Admission Of This Evidence Affected The Outcome Of The Trial.

Even if the evidence should have been excluded, any error was harmless. There is no claim that any error is constitutional in nature. Consequently, harmlessness is assessed under the standard for non-constitutional errors. Under that standard, the question is "whether, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not

occurred." State v. Gresham, 173 Wn.2d 405, 433 ¶ 42, 269 P.3d 207 (2012).

Here, the defense was very successful in neutralizing the evidence. There was evidence of numerous other traumatic events in the victim's life. These included observing domestic violence, being physically abused, being robbed, being attacked or hurt badly, and observing others being attacked or hurt badly. 6/23 RP 175-76. Any of these events could have been the cause of the behavioral changes.

At the end of the case, the prosecutor did not even mention this evidence in her initial closing argument. 4 RP 401-409. She mentioned it briefly in rebuttal, in specific response to points raised by defense counsel. 4 RP 418, 432. This treatment of the evidence indicates its minor significance in the case as a whole.

The evidence of behavioral problems was a small part of this trial. The defense succeeded in minimizing its probative value. There is no reason to believe that the outcome of the case would have been different if this evidence were excluded. Any error in admitting the evidence was therefore harmless.

B. THE SENTENCING CONDITIONS IMPOSED BY THE TRIAL COURT WERE PROPER.

1. A Court Can Properly Require A Defendant To Participate In Rehabilitative Programs That Are Reasonably Related To The Risk Of Reoffending Or The Safety Of The Community.

In addition to challenging the convictions, the defendant challenges two of the conditions of community custody. He first challenges the requirement that he "[p]articipate in substance abuse treatment." CP 42, condition no. 15. Despite contrary authority from this court, this condition was proper under clear statutory language.

RCW 9.94A.703(3)(d) gives sentencing courts power to require defendants to "[p]articipate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." Here, the record shows that the defendant had a long-standing drug and alcohol abuse problem. His own testimony showed the amount of effort that he devoted to preventing a relapse of these problems. He testified that he attended three N.A. or A.A. meeting a week. He spent at least an hour every day reading self-help and recovery texts. 3 RP 344-45. He believed that living with a drug user would "put my life in jeopardy." 3 RP 350. Given the constant focus needed to maintain

the defendant's sobriety, the court could properly conclude that continued treatment was "reasonably related to ... the offender's risk of reoffending [and] the safety of the community."

This court has nonetheless interpreted RCW 9.94A.703(3)(d) as limited to rehabilitative programs that are related to the circumstances of the offense. The court reasoned that any other interpretation would render superfluous RCW 9.94A.703(3)(c), which allows a court to require the defendant to "participate in crime-related treatment or counseling services." State v. Jones, 118 Wn. App. 199, 209-10, 76 P.3d 258 (2003); see State v. Munoz-Rivera, 190 Wn. App. 870, 891-92 ¶¶ 41-43, 361 P.3d 182 (2015). In this case, the record shows that the defendant was not using drugs or alcohol at the time of the crimes. As a result, treatment requirements were *not* "reasonably related to the circumstances of the offense." Under the reasoning of Jones and Munoz-Rivera, those requirements were therefore improper.

This court should, however, reject those cases, because they disregard the clear language of RCW 9.94A.703(3)(d). "If a statute is clear on its face, its meaning is to be derived from the plain language of the statute alone."

> We have consistently held that an unambiguous statute is not subject to judicial construction and have declined to insert words into a statute where the language, taken as a whole, is clear and unambiguous. We will not add to or subtract from the clear language of a statute even if we believe the Legislature intended something else but did not adequately express it unless the addition or subtraction of language is imperatively required to make the statute rational. We will avoid a literal reading of a statute if it would result in unlikely, absurd, or strained consequences.

The court will resort to maxims of statutory construction only if the statute is ambiguous. State v. Watson, 146 Wn.2d 947, 954-55, 51 P.3d 66 (2002) (footnotes omitted).

RCW 9.94A.703(3)(d) is clear on its face. It unambiguously allows courts to require participation in rehabilitative programs that are reasonably related to "the offender's risk of reoffending, or the safety of the community," *in addition to* those that are "reasonably related to the circumstances of the offense." There is nothing unlikely, absurd, or strained about giving trial courts broad discretion to protect the community. Consequently, there is no justification for "interpreting" the statute to effectively delete the references to "the offender's risk of reoffending" and "the safety of the community."

It is true that this statutory authority is broader than the authority to require "crime-related treatment or counseling," thereby rendering the latter provision largely superfluous. *If* the statute were ambiguous, the court would properly interpret it so as to render no portion superfluous. See Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). Jones and Munoz-Rivera, however, do not interpret the statute in this manner. Those cases do eliminate one possible superfluity, by giving meaning to the reference to "crime-relate treatment or counseling." In doing so, however, they create another one – by denying any meaning to the reference to programs that are related to "the offender's risk of reoffending, or the safety of the community." Since there is no available interpretation that prevents *any* statutory provision from being superfluous, this maxim of statutory construction is useless in this case.

In any event, the maxim has no place in construing an unambiguous statute. RCW 9.4A.703(c) and (d) are unambiguous, albeit somewhat redundant. This court cannot delete language from (3)(d) under the guise of "interpretation." Because the condition imposed by the court is reasonably related to the risk of re-offense and the safety of the community, it is proper.

2. Even If The Treatment Condition Was Improper, The Court Could Properly Monitor Compliance With Other Conditions By Requiring The Defendant To Participate In Urinalysis And Polygraph Examinations.

The defendant also challenges the requirement that he participate in urinalysis, Breathalyzer, and polygraph examinations to monitor compliance with conditions of community custody. CP 42, condition no. 16. A sentencing court has the authority to require an offender to submit to tests that monitor compliance with the conditions of community custody. State v. Riles, 135 Wn.2d 326, 341-42, 957 P.2d 655 (1998). The defendant claims that because the treatment conditions were properly imposed, the related monitoring conditions were likewise improper. As discussed above, the treatment requirements were proper, so the monitoring requirements were equally proper.

Even if this court strikes the treatment condition, however, two out of the three monitoring requirements were proper. Polygraph examinations could monitor compliance with numerous conditions that were properly imposed. See Riles, 135 Wn.2d at 342 (upholding polygraph testing as a monitoring condition). Urinalysis could detect the defendant's use of illegal drugs. Such use would be a violation of the requirement that the defendant obey

all laws. CP 41, condition no. 3. Such a condition is proper. Jones, 118 Wn. App. at 205.

The only remaining monitoring condition is Breathalyzer testing. Such a test would only detect alcohol use. The court could have required the defendant to refrain from consuming alcohol. RCW 9.94A.703(e)(3); Jones, 118 Wn. App. at 207. It did not, however, impose such a requirement. Consequently, Breathalyzer testing would only be relevant to monitoring the defendant's compliance with substance abuse treatment. If the treatment requirement is invalid, the Breathalyzer requirement is likewise invalid.

C. NOTHING IN THIS CASE RENDERS IT INEQUITABLE FOR THE DEFENADNT TO PAY COSTS IF HIS APPEAL IS UNSUCCESSFUL.

Finally, the defendant asks this court not to impose costs if the State substantially prevails on this appeal. Under RCW 10.73.160(1), this court "may require an adult offender convicted of an offense to pay appellate costs." As this court has recognized, the statute gives this court discretion concerning as to the award of costs. State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612 (2016); see State v. Nolan, 141 Wn.2d 620, 8 P.3d 300 (2000). The defendant claims that because the trial court found him to be

indigent, costs should presumptively be denied. This argument ignores both the language and the history of RCW 10.73.160.

To begin with, RCW 10.73.160 expressly applies to indigent persons. The title of the enacting law is "An Act Relating to indigent persons." Laws of 1995, ch. 275. RCW 10.73.160(3) provides for "recoupment of fees for court-appointed counsel." Counsel is ordinarily appointed only for indigent persons. RCW 10.73.150. If the statute does not ordinarily apply to indigent persons, then it ordinarily does not apply at all.

Second, the statute adopts existing procedures. "Costs ... shall be requested in accordance with the procedures contained in Title 14 of the rules of appellate procedure." RCW 10.73.160(3). "In the absence of an indication from the Legislature that it intended to overrule the common law, new legislation will be presumed to be in line with prior judicial decisions in a field of law." Glass v. Stahl Specialty Co., 97 Wn.2d 880, 887-88, 652 P.2d 948 (1982). RCW 10.73.160 should therefore be construed as incorporating existing procedures relating to appellate costs.

Prior to 1995, the rules governing appellate costs in criminal cases were the same as those applied in civil cases. See State v. Keeney, 112 Wn.2d 140, 141-42, 112 P.2d 140, 769 P.2d 295

(1989). In civil cases, the rule was that "[u]nder normal circumstances, the prevailing party on appeal would recover appeal costs." Pilch v. Hendrix, 22 Wn. App. 531, 534 P.2d 824 (1979). The appellate court nonetheless had discretion to deny costs.

Three cases provide examples of circumstances under which costs can be denied. In one, the court decided the merits of a moot case. It refused to award costs because "this appeal was retained and decided, not for any benefit which either of the parties would receive in consequence of the decision, but for the public interest involved." National Electrical Contractors Assoc. v. Seattle School Dist. No. 1, 66 Wn.2d 14, 23, 400 P.2d 778 (1965);

In a second case, the plaintiffs brought suit to resolve issues arising from the anticipated dissolution of a water district. The trial court rendered judgment for the defendants. On appeal, the Supreme Court reversed that judgment because the action was brought prematurely. The court nonetheless refused to award costs: "While appellants prevail, in that the judgment appealed from is set aside, they are responsible for the bringing of the premature action and will not be permitted to recover costs on this appeal." Water Dist. No. 111 v. Moore, 65 Wn. App. 392, 393, 397 P.2d 845 (1964).

A third example is the recent decision of this court in General Construction Co. v. P.U.D. No. 2, no. 32305-6-III, 2016 WL 4578106 (9/1/16). There, the court found that "both sides have contributed to the excessive litigation." The court therefore exercised its discretion to deny costs on appeal. Id. n. 2.

As these cases illustrate, appellate courts have discretion to deny costs if some unusual circumstance renders an award inequitable. The circumstances that the court considers are those connected with the issues raised in the appeal. They have nothing to do with the parties' financial circumstances.

This analysis makes practical sense. The appellate court knows what issues were considered, how they were raised, and how they were argued. It ordinarily has very little information about the parties' financial circumstances. Gaining such information requires factual inquiries which the court is poorly positioned to conduct. As the Supreme Court has recognized, "it is nearly impossible to predict ability to pay over a period of 10 years or longer." State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). Litigating such issues is likely to increase the length and expense of the appeal. This court should therefore decide the issue of costs based on the appellate record rather than on suppositions.

This analysis is also consistent with long-standing practice under RCW 10.73.160. That statute was enacted in 1995. In 1997, the Supreme Court held that costs could be awarded under the statute without a prior determination of the defendant's ability to pay. Blank, 131 Wn.2d at 242. From then until 2015, this court routinely awarded appellate costs to the State when it prevailed in a criminal appeal. The Legislature has made no changes to the statute with regard to adult offenders.

"In interpreting a statute, we accord great weight to the contemporaneous construction placed upon it by officials charged with its enforcement, especially where the Legislature has silently acquiesced in that construction over a long period." In re Sehome Park Care Ctr., Inc., 127 Wn.2d 774, 780, 903 P.2d 443 (1995). For almost 20 years, this court and the Supreme Court construed RCW 10.73.160 as providing for the routine imposition of costs against indigent defendants. The Legislature has acquiesced in that decision. There is no reason for applying different standards now. If the Legislature believes that this results in an undue burden on adult defendants, it can amend the statute – just as it has done for juvenile offenders. See Laws of 2015, ch. 265, § 22 (eliminating

statutory authority for imposition of appellate costs against juvenile offenders).

In the present case, this analysis should lead the court to impose costs. The case presents a routine evidentiary issue. The defendant litigated the case for his own benefit, not for any public interest. With regard to the sentencing issue, the defendant did not raise an objection at sentencing, which could have rendered an appellate challenge unnecessary. Nothing in this case supports permanently shifting the costs of the defendant's appeal from the guilty defendant to the innocent taxpayers.

If this court focuses on the defendant's ability to pay, nothing in the record indicates that he is physically incapable of finding employment after his release. At sentencing, he raised no objection to paying $25 a month towards his financial obligations. Sent RP 28.

This court should award costs. If it turns out that payment creates manifest hardship, the defendant can move for remission under RCW 10.73.160(4). If accrual of interest creates a hardship, the court can reduce or waive interest under RCW 10.82.090.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on September 19, 2016.

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

THE STATE OF WASHINGTON, Respondent, v. CLIFTON E. TURNER, Appellant.	No. 73904-2-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 19th day of September, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Maureen Cyr, Washington Appellate Project, maureen@washapp.org; and wapofficemail@washapp.org.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 19th day of September, 2016, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office