

NO. 36350-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

KRISTINA GRIER,

Appellant.

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

The Honorable Rosanne Buckner, Judge
The Honorable Beverly Grant, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE COURT VIOLATED GRIER'S DUE PROCESS
RIGHT TO A COMPETENCY HEARING.

The State claims "this court should defer to Mr. Clower's order vacating the order for a competency evaluation, and deny the defendant relief" because Clower believed a competency evaluation was unnecessary. Brief of Respondent (BOR) at 14. Clower's opinion regarding Grier's competency is nowhere stated in the record. Even if it were, defense counsel cannot waive Grier's due process right to an evidentiary hearing once the trial court doubts competency. Odle v. Woodford, 238 F.3d 1084, 1088-89 (9th Cir. 2001).

Moreover, the State moved for the pre-trial competency evaluation and signed the order for the evaluation. CP 191; 3RP 3. The State's position on appeal is opposite to the one it advanced at the trial level.

Judge Lee made a threshold determination that there was reason to doubt Grier's competency. CP 188-91. This is not a case, then, where Grier on appeal must demonstrate there was a reason to doubt competency in order to show the trial court erred in not conducting an evidentiary hearing. City of Seattle v. Gordon, 39 Wn. App. 437, 693 P.2d 741 (1985), cited by the State, is distinguishable on precisely this ground. BOR at 13-14. Gordon held the trial court did not abuse its discretion in

determining there was no reason to doubt competency. Gordon, 39 Wn. App. 441-43. An evidentiary hearing on the competency issue was therefore not required. Id. at 443.

The State alternatively argues this Court should remand for a retrospective competency hearing because (1) less than two years have passed since the beginning of trial in April 2007; (2) Clower could testify about why he presented the vacature order; (3) the trial court could determine competency based on Grier's letters to the court. BOR at 14-15.

Relevant factors in determining the feasibility of a retrospective competency hearing include (1) the passage of time, (2) the availability of contemporaneous medical evidence, including medical records and prior competency determinations, (3) any statements by the defendant in the trial record, and (4) the availability of individuals and trial witnesses, both experts and non-experts, who were in a position to interact with defendant before and during trial, including the trial judge, counsel for both the government and defendant, and jail officials. McGregor v. Gibson, 248 F.3d 946, 962-63 (10th Cir. 2001). Overall, a retrospective competency hearing is possible only "when the record contains sufficient information upon which to base a reasonable psychiatric judgment." Odle, 238 F.3d at 1089.

Retrospective determinations of whether a defendant is competent to stand trial are strongly disfavored. Wilkins v. Bowersox, 145 F.3d 1006, 1014 (8th Cir. 1998). "[I]t is the rare case in which a meaningful retrospective competency determination will be possible. The inherent difficulty of such a determination, of course, is that there will seldom be sufficient evidence of a defendant's mental state at the time of trial on which to base a subsequent competency determination. [citation omitted] This is because a trial court's initial failure to hold a timely competency hearing is almost always rooted in a fundamental inattentiveness to the defendant's mental condition. The record in such cases will, therefore, seldom contain useful contemporaneous information regarding a defendant's mental state at the time of trial and his ability, at that time, to understand the nature of the proceedings and assist in his defense." People v. Ary, 13 Cal. Rptr.3d 482, 493, 118 Cal. App.4th 1016 (Cal. App. 2004). Such determinations encounter "inherent difficulties" even "under the most favorable circumstances." Drope v. Missouri, 420 U.S. 162, 183, 95 S. Ct. 896, 43 L. Ed.2d 103 (1975).

The circumstances are far from favorable here. Grier did not testify at trial. There are no statements by Grier in the record aside from her pre-trial letters to the court. This was the evidence that caused the State to doubt competency in the first place. There are no expert witnesses

who interacted with Grier. Two years have already passed since the trial court found reason to doubt competency. These factors, standing alone, militate against a retrospective hearing.

But the dispositive factor here is the complete absence of contemporaneous psychiatric evaluation. There is no realistic possibility that a trial judge will have adequate information needed to accurately evaluate Grier's competency more than two years later without contemporaneous medical evidence addressing the issue.

In determining whether a retrospective competency hearing is feasible, the lack of contemporaneous medical evidence is an especially important consideration. State v. Davis, 130 P.3d 69, 79 (Kan. 2006); McGregor, 248 F.3d 946 at 962. The complete lack of medical evidence exacerbates the problems inherent in retroactively determining competency after a significant passage of time. Davis, 130 P.3d at 79. "[M]edical reports contemporaneous to the time of [trial] greatly increase the chance for an accurate retrospective evaluation of a defendant's competence." Moran v. Godinez, 57 F.3d 690, 696 (9th Cir.1994). This is why Washington statute mandates expert evaluation on competency once there is reason to doubt competency. RCW 10.77.060.

When a judge finds that the competency concern is sufficient to warrant an order for a medical determination on the issue and the record

is silent on why the judge did not pursue the medical determination, a retrospective judicial determination of competency in the absence of contemporaneous medical evidence cannot stand. Davis, 130 P.3d at 79; cf. Dusky v. United States, 362 U.S. 402, 403, 80 S. Ct. 788, 4 L. Ed.2d 824 (1960) (remanding for a new trial rather than retrospective hearing "in view of the doubts and ambiguities regarding the legal significance of the psychiatric testimony in this case and the resulting difficulties of retrospectively determining the petitioner's competency as of more than a year ago.").

There is no contemporaneous medical evidence regarding Grier's competency to stand trial. Reversal of conviction and remand for a new trial is the only appropriate remedy.

The court in Ary remanded to determine whether a retrospective competency hearing could be held only because extensive expert testimony and evidence had already been proffered regarding defendant's mental retardation and his ability to function in the legal arena in connection with pretrial hearings on the defendant's competency to waive his Miranda¹ rights. Ary, 13 Cal. Rptr.3d at 493; accord People v. Kaplan, 57 Cal. Rptr.3d 143, 155, 149 Cal. App.4th 372 (Cal. App. 2007)

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966).

(retrospective competency hearing might be possible because defendant was evaluated by two doctors at the beginning of trial for the purpose of determining his competence and both filed reports summarizing their observations and conclusions on this subject); Rhode v. Olk-Long, 84 F.3d 284, 287-88 (8th Cir. 1996) (several medical experts examined petitioner during the trial or not long after conviction; "the contemporary nature of these doctors' examinations of appellant was sufficient to make an adequate hearing possible.").

Even if this Court concludes a retrospective competency hearing might be possible, the remedy should be remand to allow the trial court to determine the feasibility of holding the hearing, rather than outright directing the trial court to hold the hearing. Ary, 13 Cal. Rptr.3d at 493-94; Kaplan, 57 Cal. Rptr.3d at 156. The State will have the burden of establishing a retrospective competency hearing can be held. Ary, 13 Cal. Rptr.3d at 493. Grier is entitled to a new trial if the State fails to carry its burden of proving a meaningful retrospective competency hearing could be held. Kaplan, 57 Cal. Rptr.3d at 156.

2. PROSECUTORIAL MISCONDUCT DEPRIVED GRIER OF HER RIGHT TO A FAIR TRIAL WHERE THE PROSECUTOR DELIBERATELY PLACED EVIDENCE OF GRIER'S DRUG USE IN FRONT OF THE JURY.

The State claims evidence that Grier had marijuana in her pocket on the night of the offense was not prejudicial but then points to this same evidence in arguing her alleged chemical dependency contributed to the offense. BOR at 22-25, 60. The jury could draw the same inference, thus illustrating the unduly prejudicial nature of this evidence.

3. IRRELEVANT AND UNDULY PREJUDICIAL EVIDENCE VIOLATED GRIER'S RIGHT TO A FAIR TRIAL.

In reference to evidence that Grier called Nathan and Michaels offensive names, the State complains Grier did not cite any authority for the proposition that the chain of events could have been presented to the jury without purposefully eliciting the specific hurtful words. BOR at 32-33.

"ER 404(b) evidence is generally inadmissible and the burden is on the State to establish that evidence of other offenses is not only relevant but '*necessary to prove an essential ingredient of the crime charged.*'" State v. Brown, 132 Wn.2d 529, 634, 940 P.2d 546 (1997) (emphasis in original) (citation omitted). In determining whether to exclude evidence

on grounds of unfair prejudice, the availability of other means of proof is an appropriate factor to consider. Old Chief v. United States, 519 U.S. 172, 184-85, 117 S. Ct. 644, 136 L. Ed.2d 574 (1997); see Arlio v. Lively, 474 F.3d 46, 53 (2d Cir. 2007) (admission of arbitration determination violated FRE 403 where the same point could have been made in less prejudicial manner). It was unnecessary to elicit the specific names used by Grier and they were irrelevant to prove an essential element of the State's case.

The State claims defense counsel was not ineffective in failing to object to evidence that Grier withheld her disabled son's social security money until he returned her gun clip because the evidence was "inextricably linked to the murder" and relevant to show she was attempting to arm herself with a functional gun. BOR at 37-38. The fact that Grier wanted to obtain her gun clip may have been admissible, but that is not the problem here. Error lies in allowing the jury to hear the means by which Grier attempted to obtain the clip.

The evidentiary point could have been made without the fact that Grier withheld her son's social security money simply by allowing the jury to consider Nathan's testimony that Grier wanted her gun clip. See State v. Fish, 99 Wn. App. 86, 94, 992 P.2d 505 (1999) (claim of self-defense in murder case; photograph showing victim pointing gun at defendant's

friend hours before shooting inadmissible as res gestae because other evidence fully described victim's acts that led up to shooting).

"Evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable." State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). Grier's action of withholding her son's money was not relevant to any issue of consequence and portrayed Grier as a bad person. ER 404(b) prohibits admission of evidence simply to prove bad character. State v. Lough, 125 Wn.2d 847, 859, 889 P.2d 487 (1995). Counsel should have objected.

The State argues evidence regarding where Nathan was living was relevant to show Nathan's knowledge of the residence and the location of Grier's weapons. BOR at 39. But no one disputed Nathan's familiarity with his mother's house or his knowledge about her guns. See Powell, 126 Wn.2d at 261-62 (trial court erred in admitting ER 404(b) evidence to prove intent because intent was not disputed). The prosecutor was capable of eliciting Nathan's knowledge of these things without letting the jury know that he had been in foster care and that "my mom didn't want me at the house really that much because I didn't like her boyfriend." 1RP 140.

The State argues evidence of Grier pointing a gun at Nathan earlier in the night was admissible for the purpose of showing a continuous

course of provocative conduct to rebut her claim of self-defense. BOR at (27-30 (citing State v. Thompson, 47 Wn. App. 1, 733 P.2d 584 (1987); State v. Turner, 29 Wn. App. 282, 627 P.2d 1324 (1981))).

Turner is inapposite because the challenged evidence in that case involved the defendant pointing a rifle at the eventual victim on a previous occasion, and was thus probative of motive. Turner, 29 Wn. App. at 286, 290. Grier's case involves pointing the gun at her son, not Owen, and thus does not show motive to kill Owen. See Powell, 126 Wn.2d at 261 ("Evidence of previous disputes or quarrels between the accused and the deceased is generally admissible in murder cases, particularly where malice or premeditation is at issue.").

Thompson is also distinguishable. The defendant in that case threatened to kill one of the eventual victims and pointed a gun at a bystander while fighting one of the victims when that person suggested "they should make it a fair fight." Thompson, 47 Wn. App. at 4. Both events occurred in the hour before the death and injury of the victims. Thompson, 47 Wn. App. at 4. The court of appeals ruled this evidence was relevant and admissible as res gestae "because it showed a continuing course of provocative conduct during the course of an evening." Id. at 11. The court did not provide any analysis why undue prejudice did not outweigh probative value under the facts of that case. Id.

In contrast, Grier's threat involved her son, not the eventual victim, and it did not take place while Grier fought with Owen. 1RP 444-46. There is no unbroken chain of events linking the threat to her son and the eventual shooting of Owen and the threat directed towards her son was not otherwise an inseparable part of Owen's shooting. State v. Mutchler, 53 Wn. App. 898, 901, 771 P.2d 1168 (1989) ("other acts should be inseparable parts of the whole deed or criminal scheme."); cf. State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981) (ER 404(b) evidence admissible under res gestae exception where each collateral crime "was a link in the chain leading up to the murder and the flight therefrom.").

But even if admissible as res gestae, the jury likely viewed this event as evidence of Grier's propensity to commit the murder in the absence of a limiting instruction. See State v. Bacotgarcia, 59 Wn. App. 815, 822, 801 P.2d 993 (1990) ("ER 404 is intended to prevent application by jurors of the common assumption that 'since he did it once, he did it again.'"). "Absent a request for a limiting instruction, evidence admitted as relevant for one purpose is considered relevant for others." Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP, 110 Wn. App. 412, 430, 40 P.3d 1206 (2002). Although propensity evidence is relevant, the risk that a jury uncertain of guilt will convict anyway because a bad

person deserves punishment "creates a prejudicial effect that outweighs ordinary relevance." Old Chief, 519 U.S. at 181 (citation omitted).

The State argues evidence that Grier displayed her guns a week earlier was admissible because it was "marginally relevant" to show she owned or had access to firearms and that she was armed. BOR at 41. But as the State points out in its brief, multiple witnesses observed Grier with guns on the night of the shooting. BOR at 41. Her non-threatening display of weapons a week before the shooting has no logical connection to any issue of consequence and the State had other means to establish Grier's ownership and access to firearms.

The State argues counsel was not ineffective in failing to timely object to evidence that Grier fired her gun to scare off people who were in her driveway on an earlier occasion. BOR at 43. The State claims this evidence was relevant to show that Grier knew the sound of her gun. BOR at 43. But before eliciting this testimony, the prosecutor had already established Grier knew the sound of her guns because she went to a shooting range. 1RP 136.

The State claims counsel was not ineffective in failing to object to Starr's testimony that Grier believed people were living in her attic and that her boyfriend wanted to steal her child and sent a man to rape her. BOR at 44-45. The State contends this evidence was relevant to show

Grier carried firearms on the night of the shooting and had easy access to them. BOR at 44. The State fails to explain why it was necessary to present evidence that "Kristina is hearing voices in the attic"² and that she believed her boyfriend hired people to rape her in order to show Grier carried and had access to firearms. Other testimony from Nathan, Starr, and Michaels established those facts. See BOR at 41.

The State alternatively claims defense counsel did not object as a matter of legitimate trial strategy, pointing to counsel's closing argument in which he argued Starr "exaggerated what was going on there that night." BOR at 44-45. The State's argument is implausible because counsel at no time referenced Starr's testimony that Grier believed people were in her attic and that her boyfriend wanted to kidnap her daughter and had sent a man to rape her. Counsel did not make use of this testimony. The prosecutor did, which is why counsel was ineffective in failing to prevent its admission. 1RP 888-89, 976.

4. THE COURT ERRED IN ORDERING MENTAL HEALTH AND SUBSTANCE ABUSE TREATMENT AS CONDITIONS OF COMMUNITY CUSTODY.

The State concedes the trial court improperly imposed mental health evaluation and treatment as a condition of community custody.

² This is the prosecutor's description of the evidence in closing argument. 1RP 888.

BOR at 59. This portion of the sentence should be reversed and struck because the court did not find Grier was a mentally ill person whose condition influenced the offense as required under RCW 9.94A.505(9). State v. Brooks, 142 Wn. App. 842, 851-52, 176 P.3d 549 (2008); State v. Lopez, 142 Wn. App. 341, 353-54, 174 P.3d 1216 (2007).

The State also concedes the court improperly imposed substance abuse evaluation and treatment as a condition of community custody, but requests that the case be remanded so that the trial court can make the appropriate findings. BOR at 60-61. The only evidence of Grier's drug use involved the marijuana found in Grier's pocket. This isolated piece of evidence is insufficient to establish chemical dependency. Moreover, there was no evidence showing she consumed the drug before the shooting occurred. As a result, there can be no finding that consumption of the drug contributed to the offense. The condition should therefore be struck.

B. CONCLUSION

For the reasons stated above and in the opening and supplemental briefs, this Court should reverse the conviction and remand for a new trial. In the event this Court declines to reverse conviction, this Court should strike the challenged conditions of community custody.

DATED this 21 day of July 2008.

Respectfully Submitted,

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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 2ND DAY OF JULY 2008, 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.

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