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NO. 49474-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

CLEON O. MOEN,

Appellant.

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

The Honorable Michael H. Evans, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. MOEN WAS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY.

i. The court erred in failing to dismiss Juror No. 4 for actual bias.

Moen agrees his challenge for cause is appropriately characterized as “actual bias” under RCW 4.44.170(2), and not “implied bias.”

As the State concedes, courts may find actual bias “based on a juror’s factual circumstances” even “when a juror’s responses during *voir dire* do not demonstrate actual bias.” Br. Resp. at 20 (citing State v. Cho, 108 Wn. App. 315, 319, 30 P.3d 496 (2001); Smith v. Phillips, 455 U.S. 209, 222, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982) (O’Connor, J., concurring)). However, the State reasons this is appropriate only in “exceptional” circumstances not present here. Br. Resp. at 20.

For the reasons discussed in Moen’s opening brief, the circumstances present here are analogous to Cho, are unlike Perez, and support Moen’s argument regarding actual bias. Br. App. at 22-30 (citing Cho, 108 Wn. App. 315; State v. Perez, 166 Wn. App. 55, 269 P.3d 372 (2012)).

ii. Defense counsel raised and did not waive an objection for “actual bias.”

The State argues that various grounds were not raised specifically at trial, and so were not preserved. Such arguments are unpersuasive.

Specifically, the State argues “Moen’s only grounds for challenging the juror for cause was that she would ‘bend over backwards to convict’ in an effort to show neutrality,” and that Moen’s trial objection did not include such other “grounds” as whether the juror “minimized her interactions,” “would be unable to differentiate between information learned prior to trial and during the trial, and that the previous information was material.” Br. Resp. at 27.

In discussing the factual circumstances surrounding the for cause challenge, Moen is not raising new grounds on appeal. Rather, he points out that the record supports trial counsel’s concern that the juror was in fact already bending over backwards to appear neutral and remain on the jury by minimizing the scope of her contacts, the facts to which she was exposed and the relevance of such facts. See Br. App. at 17-22.

This Court should reject the State’s attempt to characterize the factual circumstances of the for cause challenge as separate “grounds,” and should find the for cause challenge involving actual bias was not waived.

- iii. Defense counsel did not move to remove the juror out of concern the juror would be biased in favor of counsel’s own client.

The State disingenuously argues that Moen’s counsel objected out of concern the juror would be biased in favor of his own client. Br. Resp. at 25-26. The State agrees that Moen’s counsel raised the objection on the

basis of concern the juror would bend over backward to convict, stating “Moen’s attorney claimed he was concerned that in an effort to avoid being seen as sympathetic to Moen’s family the juror would ‘bend over backwards to convict.’” Br. Resp. at 25-26 (citing RP 320). The State goes on to conclude, “This suggested that from the juror’s observed demeanor in the courtroom, if anything, Moen’s attorney viewed the prior contact as making it more difficult for her to convict.” Br. Resp. at 26. This argument misrepresents the objection.

The State’s case included a victim and three witnesses from Moen’s own family. RP 804 (wife Michelle Moen as victim); RP 317-18, 333-53 (testimony of step-son, Bradley Miller), 353-62 (testimony of grandson, Jody Martin), 1139-85 (testimony of daughter, Shelly Moen). To suggest that defense counsel moved to exclude a juror because he was concerned she would be overly favorable to the defense defies logic. If true, it would violate a core ethical principle of loyalty to one’s own client and would also constitute ineffective assistance of counsel. See e.g. RPC 1.3(1) (“A lawyer must also act with commitment and dedication to the interests of the client and with diligence in advocacy upon the client’s behalf.”) (emphasis added); State v. Robinson, 79 Wn. App. 386, 395-96, 902 P.2d 652 (1995) (discussing violation of duty of loyalty as ineffective assistance) (citing Sullivan v. Cuyler, 723 F.2d 1077, 1086 (3d Cir.1983)).

This was not the defense attorney's intent. Rather it was concern that the juror would be overly sympathetic to Moen's family, be unsympathetic to Moen (or go out of her way to show she was unsympathetic to Moen), and thus, be more likely to convict. Defense counsel stated as much when he asked the juror if she would be more likely to convict. RP 319-20. The State's bizarre argument that defense counsel objected out of concern the juror would be overly sympathetic to his own client should be rejected.

- iv. The information the juror was exposed to was relevant to the core of Moen's trial defense.

The State argues the juror did not know any relevant information. It argues "the only substantive information [the juror] had was that she [sic] suffered a gunshot wound. ... the defense used the gunshot evidence to suggest Moen may have suffered an injury to his brain. Because the minimal information known by the juror was not of consequence to either party, it was not material." Br. Resp. at 24.

As discussed in the opening brief, the nature, extent, and impact of Moen's gunshot-related injuries was a critical issue at trial, as it bore on his physical and mental capacity. Br. App. at 20-22.

The State also asserts the juror was not exposed to relevant information because "[o]ther than Dr. Stanulis' testimony, there was no

diagnosis of dementia. Thus, because Dr. Stanulis did not diagnose Moen until after he was charged, dementia would not have been a topic of conversation at the time the juror met with one or two members of Moen's family." Br. Resp. at 31.

This is an inaccurate characterization of the trial testimony. For example, Moen's daughter, Shelly Moen, testified that she believed her father was suffering from mental problems and personality changes, that she believed this prior to meeting with the State's doctor, and that she was highly involved in coordinating Moen's care (making it likely she was one of the relatives who met with Juror No. 4). Br. App. at 21 (citing RP 361, 1172-73, 1176, 1185, 1234). In addition, the State's expert testified Shelly Moen told him she did not believe Moen had dementia, putting Shelly Moen's credibility at issue. RP 1310. This also put Juror No. 4 in a position to assess the credibility of a critical witness's testimony based on prior interactions with the witness.

This Court should find that the issues relevant to Juror No. 4's actual bias were critical issues in the trial.

For the reasons discussed above, and the opening brief, the trial court's failure to dismiss Juror No. 4 for actual bias violated Moen's constitutional right to a fair trial by impartial jury, and requires remand for a retrial. U.S. CONST., AMEND VI; WASH. CONST., ART. I, §22; State v.

Gonzales, 111 Wn. App. 276, 282, 45 P.3d 205 (2002), review denied, 148 Wn.2d 1012, 62 P.3d 890 (2003)); see Br. App. at 22-30.

2. MOEN WAS DENIED HIS CONSTITUTIONAL RIGHT AGAINST CRUEL PUNISHMENT WHERE THE SENTENCING COURT FAILED TO CONSIDER HIS AGE-RELATED MENTAL INFIRMITY IN MITIGATION.

i. Recent jurisprudence supports Moen’s constitutional argument.

The State relies on decades-old language in State v. Grisby to argue, “[w]here aggravated circumstances are found by the jury it does not violate the Eighth Amendment and WASH. CONST., ART. 1, § 14, to sentence to life imprisonment without the possibility of release or parole without further consideration of mitigating circumstances.” Br. Resp. at 34 (quoting State v. Grisby, 97 Wn.2d 493, 498, 647 P.2d 6 (1982)). To the contrary, recent jurisprudence requires consideration of mitigating circumstance in the case of juveniles and suggests this reasoning extends to adults with intellectual disabilities. State v. Houston-Sconiers, 188 Wn.2d 1, 21, 24-26, 391 P.3d 409 (2017); see In re Personal Restraint of Davis, 188 Wn.2d 356, 362-67, 395 P.3d 998 (2017).

Since Grisby was decided 35 years ago, the Washington State Supreme Court has issued Houston-Sconiers, holding that courts “must consider mitigating qualities of youth at sentencing” and have discretion to deviate from statutory sentencing ranges and sentencing enhancements. 188 Wn.2d at 21, 24-26. In Davis, the Washington State Supreme Court

strongly suggested the holding of Houston-Scioners also extends to adults with intellectual disabilities. See Davis, 188 Wn.2d at 362-67. In Davis, the Court held that although Washington's death penalty statute was potentially unconstitutional with respect to its definition of intellectual disabilities, Davis's death sentence was valid where the sentencing jury gave meaningful consideration to whether Davis had intellectual disabilities, and was aware of its authority to decline to impose the death penalty. Id.

Taken together, Houston-Scioners and Davis provide strong support for the proposition that sentencing courts must, at a minimum, consider mitigating evidence before sentencing anyone potentially belonging to a vulnerable class of offenders to life in prison without parole.

- ii. The class of "elderly" is the mirror image of "juvenile" and should be granted similar protections.

The State attempts to characterize the relevant class as hyper-specialized, referring to the class by the acronym "EPWARM" for "elderly persons with age-related mental infirmities." Br. Resp. at 43.

It should be noted that mitigation for juveniles is nuanced as well. The U.S. and Washington Supreme Courts impose categorical bars on some types of juvenile sentences. The U.S. Supreme Court has imposed a categorical bar on death penalty sentences for juveniles. Roper v. Simmons,

543 U.S. 551, 568, 125 S. Ct. 1183, 161 L Ed. 2d 1 (2005). The U.S. Supreme Court has also categorically barred life in prison without the possibility of release for non-homicide juvenile offenders. Miller v. Alabama, 567 U.S. 460, 489, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012). One Washington court has extended this categorical bar to prohibit life sentences without the possibility of release for juveniles convicted of all classes of crimes, including homicide. State v. Bassett, 198 Wn. App. 714, 743, 394 P.3d 430 (2017), review granted, 189 Wn.2d 1008 (2017).

However, in other cases where a mandatory sentencing bar does not apply, juveniles (or young people) may still qualify for discretionary mitigation. The Washington State Supreme Court requires all courts to exercise discretion during sentencing to determine whether “a defendant’s youthfulness” justifies an exceptional sentence below the standard range, even when the defendant is a legal adult. State v. O’Dell, 183 Wn.2d 680, 698-99, 358 P.3d 359 (2015). This shows that the class of offenders warranting mitigation for youthfulness is not strictly defined as all legal juveniles, or all persons under the age of 18. Rather, regardless of whether a person is a legal adult or a legal juvenile, the defendant must be permitted to make some showing of youth-related infirmities and characteristics, and a sentencing court must give meaningful consideration to whether mitigation based on youthfulness is warranted. Id.

Similarly, Moen's claim is not a call for recognition of a hyper-specialized class of persons. Rather, it is a request that the Court take judicial notice of a fundamental truth inherent in the human condition; the very young and the very old share much in common. Advanced age is often accompanied by a decline in mental capacity, and in a non-trivial number of cases, dementia affecting personality, judgment, and other higher-order brain functions. See RP 1351-57 (testimony of State's expert witness). The State recognizes this reality; the Washington State Attorney General's Office has a webpage dedicated to "Vulnerable Adult Abuse" including elder abuse, and several pages dedicated to "Senior Fraud."¹ Both of these websites show a recognition by the State that the elderly are greater targets for abuse and fraud because they are more likely than the general population to suffer from confusion and reduced mental capacity.

It is undisputed that there are exceptions. Some individuals are mentally sharp into their hundreds, just as some 10-year-olds possess exceptional maturity. This does not negate the reality that youth is often accompanied by a lack of maturity and advanced age is often associated

¹ Washington State Office of the Attorney General, <http://www.atg.wa.gov/vulnerable-adult-abuse> (last visited 12/20/2017); <http://www.atg.wa.gov/senior-fraud> (last visited 12/20/2017).

with declining mental capacity.² Courts have balanced this reality with the variety of individual human experiences. The result has been a categorical bar of extreme sentences—the death penalty and life in prison without the possibility of release—coupled with a requirement that in all other cases, sentencing courts must give meaningful consideration to age-related characteristics, regardless of statutory mandates. *E.g.* Roper, 543 U.S. at 568; Bassett, 198 Wn.2d at 743; O’Dell, 183 Wn.2d at 698-99.

Age-related mental infirmities are the mirror image of the “youthfulness” category recognized in O’Dell, 183 Wn.2d at 698-99. This class of persons should be recognized by this Court as deserving of equivalent protections.

Another benefit to the O’Dell approach is that it does not require a legal definition of elderly. A strict legal definition of elderly may prove constitutionally problematic. *See* Hall v. Florida, ___ U.S. ___, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014) (holding intellectual disability could not be rigidly defined). Rather, under the O’Dell approach, where the issue is raised at sentencing, courts must exercise discretion to determine whether a particular offender has the relevant traits to warrant membership in the class and mitigation in sentencing. O’Dell, 183 Wn.2d at 698-99. This Court

² Seen in this light, the State’s reference to the highly polarized 2016 presidential election and the mental capacities of our current sitting president are particularly unconvincing. *See* Br. Resp. at 48.

should hold that Moen belongs to the class of elderly persons constitutionally entitled to mitigation on the basis of his age-related mental infirmities, and so Moen is entitled to resentencing.

- iii. The sentencing court failed to give meaningful consideration to Moen's age-related mental infirmities.

The State makes several arguments that Moen's mental state was already adequately considered by the sentencing court. Br. Resp. at 48-49. Specifically, the State argues the sentencing court rejected Moen's claim to membership in the asserted class. Br. Resp. at 48. The State argues evidence at trial established Moen did not qualify for diminished capacity defense, "at 73 ... was not particularly old," and did not have dementia because his memory was intact. Br. Resp. at 48. Moreover, the State argues the sentencing court reasoned Moen was neither a juvenile nor intellectually disabled, and so has already considered whether Moen's sentence was constitutional. Br. Resp. at 48-49. None of these arguments are persuasive.

The fact that Moen's diminished capacity claim was rejected by the jury does not mean he lacks age-related mental infirmities. "To present a diminished capacity defense, expert testimony must establish that a 'mental disorder, not amounting to insanity, impaired the defendant's ability...'" such that he lacked "capacity to form the requisite mental intent" for the crime. State v. Thomas, 123 Wn. App. 771, 779, 98 P.3d 1258 (2004)

(quoting State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001); State v. Ferrick, 81 Wn.2d 942, 944-45, 506 P.2d 860 (1973)) (citing State v. Warden, 133 Wn.2d 559, 564, 947 P.2d 708 (1997)) (additional citations omitted)). Thus, the definition itself contemplates that a defendant may have a mental disorder and may still retain the ability to form the requisite *mens rea*.

In Moen's case, the relevant mental state was premeditated intent. CP 78, 81. At trial, both experts testified regarding Moen's ability to plan. RP 1313-18, 1320-21 (State's witness, Dr. Hendrickson); RP 102, 828 (defense witness, Dr. Stanulis). The State emphasized Moen's ability to plan during closing argument. RP 1523-24, 1533-34. The jury rejected Moen's diminished capacity defense, and so must have concluded he retained the capacity to form premeditated intent. CP 82, 103. However, Dr. Stanulis diagnosed Moen with "frontal temporal dementia" and testified that this mental condition fundamentally altered his personality, his perception of the world, and his motivation, and caused him to perseverate, *i.e.* become unable to move on from patterns of thinking regarding past conflicts and relationship issues. RP 810-12. In essence, Dr. Stanulis's testimony supports the conclusion that Moen's mental condition did not interfere with his capacity to form premeditated intent, but rather caused him to form intent to harm Michelle Moen out of a delusional belief that it

was necessary to get her medical help. RP 810-12. This testimony supports the conclusion that Moen had a mental illness that was responsible for the crime, but that he retained the capacity to form the requisite intent for the crime. This Court should find that the failure of Moen's diminished capacity defense at trial does not preclude him from asserting that he has an age-related mental illness.

Relying in part on the testimony of the State's witness, Dr. Hendrickson, the State also asserts that Moen did not have dementia because his memory was intact. Br. Resp. at 48. However, for several reasons, it would be an error to conclude, even from Dr. Hendrickson's testimony alone, that Moen did not have any mental illness affecting his motivation to commit the crime.

First, Dr. Hendrickson repeatedly emphasized that he was evaluating Moen for diminished capacity. RP 1299, 1313, 1320. He had not evaluated Moen expressly for the purpose of diagnosing any mental disorder Moen may have. Moreover Dr. Hendrickson did not rebut the defense expert's diagnosis of frontal temporal dementia, and instead testified, "[I] can't make that diagnosis" RP 1335. In addition, regarding the CT scans the defense's expert relied upon for the diagnosis, Dr. Hendrickson testified, "I didn't look at the CT scans. I'm not sure I'd be able to understand them if I looked at them." RP 1335. Ultimately, Dr.

Hendrickson conceded that in his own report he had stated, ““Thus, while we acknowledge the possibility he has been experiencing symptoms related to front[al-]temporal neurocognitive disorder, we lack information to make a formal diagnosis at this time[.]”” RP 1335. (quoting Report of Dr. Hendrickson, at 5).

Second, Dr. Hendrickson initially testified to an overly simplistic medical diagnosis method, stating “dementia means overall memory difficulty,” and this was not present in Moen during his diminished capacity evaluation. RP 1297. However, during later testimony, Dr. Hendrickson conceded that there are several types of dementia, memory loss is only one of many symptoms, and other types of dementia include a range of diverse symptoms. RP 1348-49. Dr. Hendrickson also conceded that types of dementia affecting the frontal lobe can include symptoms such as disorganized thoughts, poor judgment, lack of awareness of own cognitive abilities, underestimation of risk, tendency toward violence and acting out, suicide attempts, disinhibited behavior such as telling inappropriate jokes, slurred speech, and delusions involving themes of persecution. RP 1351-54. All of these symptoms were highly relevant to explain Moen’s behavior. Dr. Hendrickson also agreed that dementia, of any type, often occurs later in life, is distinct from the normal cognitive decline of aging, can result in personality changes, and is progressive, meaning periods of

lucidity become less and less frequent with time. RP 1354-57. Thus, the State's attempt to equate dementia with memory loss alone is overly simplistic and not supported, even by the State's own expert.

In addition, there is no indication that jury accepted this flawed and over-simplified definition of dementia, or that jury believed Moen did not have a mental infirmity of any kind. During closing, the State specifically argued to the jury that it need not resolve the question of whether Moen had a mental illness, because the evidence at trial (the State argued) supported that Moen retained the ability to premeditate, and so his mental illness was irrelevant. RP 1523-24, 1533-34. Thus, it is likely the jury concluded Moen did not have diminished capacity, without coming to any unanimous conclusions regarding whether he did or did not have a mental illness affecting his personality or motivations.

For the reasons discussed above, and in the opening brief, there is ample support in the record that Moen was suffering from a mental illness that impacted his motivation to engage in criminal behavior.

The State also argues that "at 73, Moen was not particularly old" and so does not qualify for membership in the asserted class of elderly persons. Br. Resp. at 48. Whether or not a first-time offender at age 73 is "particularly old" is a matter of opinion. As discussed above, many factors may bear on whether a particular defendant exhibits elderly traits and should

qualify for age-related mitigation. Ultimately, it should not be the opinion of the parties that controls, but that of the court. Under the O'Dell approach discussed above, there would be no rigid definition of the term elderly. O'Dell, 183 Wn.2d at 698-99. Rather, the sentencing court would hear evidence on a particular defendant and exercise discretion to determine if he does or does not exhibit elderly characteristics, just as courts are required to consider evidence of youthfulness. Id.

The State also argues the sentencing court reasoned Moen was neither a juvenile nor intellectually disabled, and so has already considered whether Moen's sentence was constitutional. Br. Resp. at 48-49. The State's argument misrepresents the sentencing court's analysis. The sentencing court concluded, correctly, that Moen is neither a juvenile nor a person with intellectual disabilities. RP 1602. At 73 years old, Moen is neither a legal minor nor youthful, as described in O'Dell. Testimony of Moen's mental infirmity at trial centered on his frontal temporal dementia, a condition with affects people later in life. See RP 810, 1354. Intellectual disability is defined by law, and requires manifestation of symptoms prior to age 18. RCW 10.95.030(2)(a)-(e).

In rejecting these categories, the sentencing court ruled that Moen did not qualify for either definition; it did not rule directly on the asserted constitutional issue, i.e. whether Moen's mental incapacities were similar

to these categories or whether the federal or State constitutions required recognition of the elderly as a third class. See RP 1581, 1602. Instead, the sentencing court summarily dismissed the argument, concluding the federal and State constitutions did not apply where there was strong evidence of premeditation and lack of compassion, and that any mitigation was prohibited by the Legislature. RP 1603. This reasoning shows that just as the State does in its briefing, the sentencing court misconstrued Moen's argument, and improperly cast it as a challenge to the proportionality of the sentence to the severity of the crime. RP 1603; see also Br. Resp. at 40-45 (arguing Fain analysis shows the sentence is proportional) (citing State v. Fain, 94 Wn.2d 387, 917 P.2d 720 (1980)). The Fain analysis and the sentencing court's reasoning is inapplicable in this context where Moen does not assert his sentence was generally disproportionate to the crime, but rather asserts a type of categorical bar, i.e. membership in a particular class that should be entitled to protections analogous to juveniles and persons with intellectual disabilities. See RP 1581.

The testimony at trial regarding Moen's mental infirmities was relied on at the sentencing hearing to support an argument that Moen deserved mitigation under the federal and State constitutions because his condition was analogous to that of juveniles and persons with intellectual disabilities. RP 1581. For the reasons stated above and in the opening brief,

evidence of mitigation was not properly considered and was improperly rejected by the sentencing court, and this Court should find Moen is entitled to resentencing.

B. CONCLUSION

Moen's right to a fair trial by impartial jury was violated when Juror No. 4 was not dismissed for cause. His right against cruel punishment was violated when the sentencing court imposed a life sentence without the possibility of release, and refused to consider mitigating evidence related to his mental infirmities.

Moen respectfully asks that this Court reverse his conviction and remand for a new trial under AMEND. VI and ART. I, §22, or vacate his sentence and remand for resentencing under AMEND. VIII and ART. I, §14.

DATED this 28th day of December, 2017.

Respectfully submitted,

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